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May 6, 2019

By ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
Attn: Media Bureau

Re: beIN Sports, LLC v. Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384; File No. CSR-8972-P

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding,¹ beIN Sports, LLC (“beIN”) submits the enclosed public redacted version of its Reply dated May 6, 2019.

beIN has denoted with “{{BEGIN HCI}} {{END HCI}}” Highly Confidential Information taken from or derived from the Highly Confidential Information in Comcast’s Answer. beIN has also denoted with “[[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]]” beIN or Comcast confidential information taken from or derived from beIN’s Complaint or Comcast’s Answer. A Highly Confidential and a Confidential version of this filing are being simultaneously filed with the Commission.

¹ beIN Sports, LLC, Complainant, v. Comcast Cable Communications, LLC and Comcast Corporation, Defendants, Request for Enhanced Confidential Treatment, *Order*, MB Docket 18-384, DA 19-65 (Feb. 8, 2019) (“*Protective Order*”).

Marlene Dortch
May 6, 2019
Page 2

Please contact me with any questions.

Respectfully submitted,

/s/
Pantelis Michalopoulos
Counsel to beIN Sports, LLC

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	File No. CSR-8972-P
)	
v.)	
)	
COMCAST CABLE COMMUNICATIONS,)	
LLC,)	
and)	
COMCAST CORPORATION,)	
Defendants.)	
)	
)	
TO: Chief, Media Bureau)	

beIN REPLY TO COMCAST ANSWER

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May 6, 2019

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SUMMARY	6
III.	COMCAST HAS IMPROPERLY WITHHELD DECISIONALLY SIGNIFICANT EVIDENCE CONTRARY TO ITS POSITION IN THE FIRST PROCEEDING.....	13
IV.	THE ADDITIONAL EVIDENCE BEIN PROVIDED IS SUFFICIENT.....	15
V.	beIN AND beIN EN ESPAÑOL ARE SIMILARLY SITUATED TO NBC SPORTS AND UNIVERSO.....	27
	A. Comcast’s Actions Demonstrate that the Networks are Similarly Situated.....	28
	B. Comcast Sets the Bar So High that No Two Programming Lineups Would Ever Be Similarly Situated.	30
	C. The Four Networks Have Similar Audiences.	34
	D. The Relevant Ratings Comparison Shows beIN and beIN en Español to Be Comparable to, or More Popular than, NBC Sports and Universo.	39
	E. beIN and beIN en Español Directly Compete against NBC Sports/Universo for Advertisers.	49
	F. beIN Is Treated Better by Other MVPDs than under Comcast’s December 13, 2017 Offer.....	53
VI.	COMCAST’S OFFER WAS NOT JUSTIFIED BY LEGITIMATE COMMERCIAL CONSIDERATIONS	60
	A. Comcast Attempts to Impose a Higher Standard than beIN Must Meet at the <i>Prima Facie</i> Stage.	60
	B. Comcast’s Discriminatory Offer Was Not Justified by Legitimate Commercial Considerations.	61
VII.	beIN HAS DEMONSTRATED THAT COMCAST’S DISCRIMINATORY ACTIONS UNREASONABLY RESTRAINED IT FROM COMPETING	75
	A. The Comcast/NBCU Condition Applies.	75
	B. Comcast Has Unreasonably Restrained beIN’s Ability to Compete.....	76
VIII.	beIN IS NOT PRECLUDED FROM BRINGING ANY OF THE CLAIMS IN THE DECEMBER 13 COMPLAINT	80

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**IX. COMCAST’S SUBSEQUENT AUTHENTICATION, HIGH DEFINITION, AND
DIRECT-TO-CONSUMER OFFERING TERMS DID NOT ALTER COMCAST’S
DECEMBER 13 OFFER IN ANY MATERIAL WAY 83**

X. CONCLUSION 85

Exhibit 1:	Reply Declaration of Antonio Briceño
Exhibit 2:	Reply Declaration of Ken Tolle
Exhibit 3:	Reply Declaration of Roy Meyeringh
Exhibit 4:	Reply Declaration of Eric Sahl
Exhibit 5:	Reply Declaration of Hal Singer
Exhibit 6:	Reply Declaration of Steven Sklar
Exhibit 7:	beIN Comcast Competition Profile
Exhibit 8:	SNL Kagan Profile for NBC Sports
Exhibit 9:	SNL Kagan Profile for Universo

I. INTRODUCTION

Comcast's answer¹ deploys a righteous tone of outrage in an apparent attempt to divert attention from crucial admissions or non-denials on a number of questions that are at the heart of this proceeding. These include: whether beIN afforded Comcast enough certainty about the content rights on offer; whether Comcast's affiliate NBCUniversal [[BEGIN CONFIDENTIAL]]
[[END
CONFIDENTIAL]]; and whether Comcast discriminated between the programming of beIN and that of its own affiliates.

NBC offers no more certainty to distributors than beIN. Comcast admits that its NBC Sports affiliate offers no more, and in fact less, certainty to distributors than beIN has provided Comcast. As Comcast's expert Peter Litman puts it now, NBC Sports merely
{{BEGIN HCI}}

¹ Comcast Corporation and Comcast Cable Communications, LLC, Answer to Complaint, MB Docket No. 18-384 (Feb. 11, 2019) ("Answer").

² Supplemental Declaration of Peter Litman ¶ 20, attached as Exhibit 4 to Comcast's Answer ("Litman Suppl. Decl.").

³ Declaration of Steven Sklar ¶ 5, attached as Exhibit 6 ("Sklar Decl.").

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{{END HCI}}

As a threshold matter, this means that Comcast improperly withheld information contrary to its argument in its response to beIN's first complaint. The omission was of decisional significance because the Bureau's dismissal was based precisely on this ground—lack of sufficient certainty about beIN's content rights.

In any event, NBC's newly disclosed practices belie Comcast's claim that beIN's new complaint is precluded by the first complaint's dismissal without prejudice. The idea is baseless in the first place: in the Commission's words, "[w]e view these alternatives—dismissing without prejudice or asking the complainant to supplement the record—as functional alternatives."⁵ But, in these circumstances, even if beIN had proffered no additional evidence, which it has, the information elicited from Comcast is enough in itself to cure the shortcoming identified by the Bureau. The comparison with the NBC representations disclosed now for the first time by Comcast make it clear that beIN had supplied Comcast with no less, and in fact more, certainty than NBC Sports, and Comcast's claim that beIN had insufficiently defined its rights was simply a convenient pretext. While the new disclosures from Comcast warrant reopening the prior proceeding, beIN will not make such a request at this time to avoid needless expenditure of Commission resources, since the issue can be decided here.

⁴ Sklar Decl. ¶ 6.

⁵ Verizon Florida LLC v. Florida Power and Light Co., *Memorandum Opinion and Order*, 30 FCC Rcd. 1140, 1150 ¶ 25 n.88 (2015).

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The combination of the additional evidence supplied by beIN here and the comparison with what NBC gets away with in its dealings with distributors shows beyond peradventure that the lack of certainty identified by the Bureau has been conclusively cured on this record.

[[BEGIN CONFIDENTIAL]],

[[END CONFIDENTIAL]]

The existence of [[BEGIN CONFIDENTIAL]] [[END
CONFIDENTIAL]] has implications for the similarly situated status of the networks and their programming lineups, as well as for Comcast claiming that beIN's content is devoid of value to Comcast. There is no stronger evidence of similarly situated status than two programmers vying to secure the same content. In *Tennis Channel*, for example, the Commission gave significant weight to the fact that Tennis Channel and Versus "have a history of repeatedly sharing or

⁶ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

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seeking rights to the same sporting events” when finding that the two networks were similarly situated.⁷

Second, Comcast claims that beIN’s content was just not valuable enough to Comcast.⁸ That claim is directly belied by its programming affiliate’s [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

Comcast’s claim of legitimate commercial considerations does not belong in the first, *prima facie* stage of the program carriage complaint in the first place. To find otherwise now would render Section 616 meaningless, as vertically-integrated MVPDs could offer a mere fig leaf of unsubstantiated and untested commercial considerations in order to dispense with any claim. In any event, the Bureau [[BEGIN CONFIDENTIAL]]

⁷ *Tennis Channel, Inc. v. Comcast Cable Communications, Memorandum Opinion and Order*, 27 FCC Rcd. 8508, 8527 ¶ 52 (2012) (“*Tennis Channel MO&O*”); *see also* *Game Show Network v. Cablevision Systems Corp., Memorandum Opinion and Order*, 32 FCC Rcd. 6160, 6176 ¶ 51 (2017) (“*GSN MO&O*”).

⁸ Answer ¶¶ 4, 7.

⁹ Reply Declaration of Antonio Briceño ¶ 7, attached as Exhibit 1 (“Briceño Reply Decl.”).

[[END

CONFIDENTIAL]]

Comcast has treated beIN worse than Comcast’s programming affiliates. beIN tries to explain, but does not deny, this discriminatory treatment, which includes: [[BEGIN
CONFIDENTIAL]]

[[END CONFIDENTIAL]] The sheer inequality of treatment evokes an early Winston Churchill speech: “An open hand at the public exchequer, an open door at the public house; dear food for the millions, cheap labor for the millionaire.” The last two differences in treatment are particularly jarring: [[BEGIN CONFIDENTIAL]]

[[END
CONFIDENTIAL]] Here Comcast does not even try to argue that it derives some benefit from the discrepancy. There is no such benefit; in fact, there are increased costs. [[BEGIN
CONFIDENTIAL]]

¹⁰ Reply Declaration of Ken Tolle ¶ 6, attached as Exhibit 2 (“Tolle Reply Decl.”). [[BEGIN
CONFIDENTIAL]]

[[END CONFIDENTIAL]] *Id.* ¶ 4.

[[END

CONFIDENTIAL]]

The program carriage rules would mean little if Comcast's actions were to be rewarded with impunity.

II. SUMMARY

1. **beIN is Not Precluded from Bringing the December 13 Complaint.** Comcast contends that, when the Bureau dismissed beIN's complaint without prejudice, it precluded the filing of this complaint. This argument leaves Comcast unable to explain what "without prejudice" means, and defies well-established law on the meaning of "without prejudice."

2. **The Additional Evidence beIN Provided Is New and Sufficient.** The December 13 complaint addresses the *Dismissal Order*¹¹ by adding substantial new evidence demonstrating the certainty of beIN's programming. This includes: [[BEGIN

CONFIDENTIAL]]

¹¹ beIN Sports, LLC, Complainant v. Comcast Cable Communications, L.L.C., and Comcast Corporation, Defendants, *Memorandum Opinion and Order*, 33 FCC Rcd. 7476 (MB 2018) ("*Dismissal Order*").

[[END

CONFIDENTIAL]] As Mr. Sklar explains, this is greater certainty than NBC Sports offers.¹³

3. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

4. **The beIN and NBC Networks Are Similarly Situated.** *Competition for content.* Comcast is sniffing at beIN's programming as supposedly inferior to NBC's, and not worth Comcast's while, even as NBC is [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] The beIN and NBC networks are even more comparable with one another than both the Tennis Channel and the NFL Network were with Comcast-affiliated Versus and the Golf Channel, and MASN was with Comcast SportsNet Philadelphia and Comcast SportsNet Mid-Atlantic. They are each sports-centric. Indeed, they are both soccer-centric within the broad sports theme.

5. *Competition for advertisers.* In its answer to beIN's first complaint, Comcast had initially disputed that the beIN and NBC networks compete for advertisers on the ground that

¹² Reply Declaration of Roy Meyeringh ¶ 5, attached as Exhibit 3 ("Meyeringh Reply Decl.").

¹³ Sklar Decl. ¶¶ 7-8.

¹⁴ Meyeringh Reply Decl. ¶ 7.

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they have only a handful of advertisers in common.¹⁵ In its reply, beIN showed this was flatly untrue: the beIN and NBC networks share over [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] advertisers. Many of them are small companies for which these networks are uniquely or especially suitable for placing ads, such as [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

This time around, Comcast is unable to rebut that number; instead, its economic expert Dr. Lerner argues the large number of common advertisers may not be a “reliable” indication of competition because [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] common advertisers allocated “a material percentage of their ad spend – more than ten percent” to both the beIN and NBC networks. What is the genesis of that curious 10% threshold? Dr. Lerner does not say. beIN’s expert economist, Dr. Hal Singer, explains that it lacks grounding in economics or logic. Moreover, in trying to prove the thesis that advertisers do not move business between the beIN and NBC networks, Dr. Lerner produces a chart that suggests just the opposite: it shows a large number of instances where the increase in advertising spend on NBC is accompanied by a corresponding decrease of spend on beIN.

6. *Demographics.* Despite Comcast’s claim that its networks reach older and less affluent viewers, the two pairs of networks attract similar demographics. The viewers of both beIN and NBC Sports skew strongly male [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

and have very similar incomes of [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]]—hardly the rich/poor

¹⁵ Comcast Corporation and Comcast Cable Communications, LLC, Answer to Complaint, MB Docket No. 18-90, ¶46 (May 14, 2018) (“Comcast Answer to First Complaint”).

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picture painted by Comcast. As for beIN en Español and Universo, the median viewer ages of both networks' viewers are only one year apart—so much for age difference.

7. *Audience Overlap.* Comcast claims that there is limited overlap between viewers of the beIN networks and the NBC Sports and Universo networks by citing a useless set of numbers: the percentage of NBC viewers who also watch beIN. Since the NBC Sports and Universo networks reach more than 80 million households and the beIN networks reach a fraction of that number, it is rather natural that the majority of NBC viewers could not tune to beIN whether they wanted to or not. The correct question to ask is how many of beIN's viewers, most or all of whom also have access to NBC, also view the NBC networks. The answer is that the majority do.¹⁶ The overlap is more than [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] what Comcast claims in the case of NBC Sports, and more than [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] what Comcast claims in the case of Universo.

8. *Ratings.* When a network has access to three times more households than another, it is neither surprising nor useful to know that more viewers watch the first than the second. To compare apples to apples, the two networks' ratings must be expressed as percentages of the viewers to whom each has access. Comcast dismisses coverage-area ratings on the ground that they tell us nothing about beIN's ratings when it is distributed more broadly. Not so: beIN in fact experienced significant, more than six-fold, ratings growth in the Dallas market where Time Warner gave beIN broad distribution in 2015.

¹⁶ Briceño Reply Decl. ¶ 14 (for 2018, [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of beIN viewing households also watched NBC Sports, and [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of beIN en Español viewing households also watched Universo).

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9. *Other Distributors.* The relevant question is whether Comcast treats beIN worse than it treats its affiliates, not whether Comcast treats beIN worse than other distributors do. But in any event, Comcast's offer would treat beIN worse than other comparable distributors. First of all, according to beIN's expert economist, Dr. Hal Singer, Comcast's attempt to point to AT&T's conduct is unavailing. Like Comcast, AT&T is vertically integrated with prominent sports programmers, and has a similar incentive to discriminate against beIN as Comcast does. Moreover, a few days after Comcast dropped beIN, [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]]—making AT&T's conduct a likely consequence of Comcast's actions rather than a justification for them.

10. On average, the non-conflicted distributors that carry beIN and beIN en Español do so to a higher percentage of their subscribers than Comcast does now, and as compared to beIN's penetration under the December 13, 2017 offer. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Similar results are obtained when examining carriage of beIN *or* beIN en Español (as opposed to carriage of both).

11. **Comcast's Offer Is Discriminatory.** Comcast has little to say about the question of discrimination itself. It does not deny the preferential distribution afforded to NBC Sports and

¹⁷ Tolle Reply Decl. ¶¶ 4, 8.

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Universo, the higher rates paid to them, its carriage of them in HD, and its authentication of Comcast subscribers to allow online viewing of NBC Sports and Universo programming.

12. Comcast's Discrimination Is Not Excused by Legitimate Commercial

Considerations. Comcast turns to the argument that the discriminatory treatment is justified by legitimate commercial reasons. beIN does not need to show that the treatment is unjustified at the *prima facie* stage.¹⁸ But this is no matter, as beIN can in fact make that showing now. The idea that Comcast made the December 13, 2017 offer because broader distribution of beIN's network would not yield a "net benefit" for Comcast or would lose Comcast money cannot survive a simple fact—the [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of Comcast's proposal. At a [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]], broader distribution would be all upside and no downside for Comcast. In other words, Comcast cannot meet the "no net benefit" standard articulated by the D.C. Circuit in *Tennis Channel*, where additional distribution meant substantially higher fees.

13. Comcast instead makes a strawman showing—that *any* carriage of beIN on Comcast's part yielded no benefit for Comcast and was essentially an act of philanthropy. That showing suffers from fatal flaws. First of all, as Dr. Singer explains, [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] was presumably informed by Comcast's duty to its shareholders to pursue profit.¹⁹ Moreover, Comcast's churn analysis of its costs includes only Comcast customers who left Comcast or Comcast's video service completely, and disregards customers who dropped the

¹⁸ See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

¹⁹ Declaration of Hal Singer ¶ 17, attached as Exhibit 5 ("Singer Decl.").

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Sports and Entertainment or Latino packages. Comcast also ignores the costs it had to incur to retain customers after it discontinued carrying beIN. And Comcast's notion that the dropping of beIN was almost the equivalent of a tree falling in the forest with no witnesses is sharply contradicted by the testimony of Mr. Meyeringh: beIN's website dedicated to informing customers about beIN's dispute with Comcast has received 2.4 million visitors since beIN was dropped by Comcast.²⁰ In any event, as Dr. Singer explains, a proper analysis of the economic benefits of broader distribution would have to, first, *assume* broader distribution and then estimate what the churn would be from subsequent discontinuance of beIN when many more Comcast customers have been exposed to its programming. A proper analysis would also require Comcast to demonstrate that it consistently imposes the same net benefit test on its own affiliated networks, which it fails to do.

14. As for the availability of Sling's \$10 World Sports package, which includes beIN, on the Xfinity platform, the 1992 Cable Act is specifically concerned with discrimination relating to carriage on a cable system's linear platform.²¹ beIN's availability through means other than Comcast's cable system cannot excuse discrimination as to carriage on its cable system. In any event, beIN is not available at all to those Comcast customers who are not on the X1 platform. Comcast also does not mention that the viewing of content on that package counts against Comcast data caps and hence is a substantially inferior alternative. Nor does Comcast discuss the subscribers who have an interest both in beIN and in other networks available on

²⁰ Meyeringh Reply Decl. ¶ 10.

²¹ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460, 1460-61 (1992) (finding that vertical integration in the cable industry "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems") ("1992 Cable Act"); 47 U.S.C. § 521(5).

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Comcast's Sports and Entertainment or Español packages but not on the Sling package. For them, continuing to watch beIN would require forking over another \$10 a month.

15. **Comcast Has Unreasonably Restrained beIN's Ability to Compete.** beIN's ability to compete is being restrained already today. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

In any event, no showing of a restraint on beIN's ability to compete is necessary under the program carriage condition to which Comcast's acquisition of NBC was subject.²³ Comcast's offer was made on December 13, 2017, while that condition was still in force.

III. COMCAST HAS IMPROPERLY WITHHELD DECISIONALLY SIGNIFICANT EVIDENCE CONTRARY TO ITS POSITION IN THE FIRST PROCEEDING

16. Comcast effectively admits that its NBC Sports affiliate offers no more, and in fact less, certainty to distributors than beIN has provided Comcast. This means, first of all, that Comcast had improperly withheld information undermining its argument in its response to

²² Briceño Reply Decl. ¶ 26.

²³ Applications of Comcast Corporation, General Electric Company and NBCU Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4287 ¶ 121 (2011).

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beIN's first complaint, depriving the Bureau of a decisionally significant fact.²⁴ Specifically, Comcast alleged that "beIN's [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] was another major obstacle to a deal."²⁵ That allegation would have been directly undermined by the fact that NBC Sports provides less certainty than beIN did about the programming it offers: typically, as Comcast's expert Peter Litman puts it now, it merely {{BEGIN HCI}}

{{END HCI}} which are, even when taken together, less than what beIN has offered: {{BEGIN HCI}}

{{END HCI}} Comcast thus withheld evidence contrary to its argument.²⁹ What is more, the omission was of decisional significance because the Bureau's dismissal was based precisely on this ground—lack of sufficient certainty about beIN's content rights.

²⁴ Sklar Decl. ¶ 12.

²⁵ Comcast Answer to First Complaint ¶ 9.

²⁶ Litman Suppl. Decl. ¶ 20.

²⁷ Comcast still does not disclose what kind of assurances, if any, Universo offers.

²⁸ Sklar Decl. ¶¶ 6-8.

²⁹ See 47 C.F.R. § 76.6(a)(1) ("All matters concerning a . . . defense . . . should be pleaded fully and with specificity.").

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17. NBC's newly disclosed practices also belie Comcast's claim that beIN's new complaint is precluded by the first complaint's dismissal without prejudice. As beIN shows, the idea is baseless in the first place: when a tribunal dismisses a claim without prejudice to refiling because of the lack of evidence on an issue, the proffer of the evidence found missing is invited, not precluded. But, in these circumstances, NBC's practice means that, even if beIN had proffered no additional evidence, which it has, the information elicited from Comcast is enough in itself to cure the shortcoming identified by the Bureau: even on the record of the prior proceeding, the comparison with the NBC representations disclosed now for the first time by Comcast would make it clear that beIN had supplied Comcast with no less, and in fact more, certainty than NBC. The claim that beIN had insufficiently defined its rights was simply a misleading pretext.

18. The importance of this conduct reverberates beyond these two areas as it justifies skepticism about other factual assertions that Comcast has made and mandates, at a minimum, discovery. The first phase of the program carriage process is necessarily limited in its fact-finding potential as it is unaided by factual discovery and limited to the testimony the parties place on the record before the Bureau. Comcast should be given a clear signal that it may not make a mockery of the process by providing misleading and incomplete testimony.

IV. THE ADDITIONAL EVIDENCE BEIN PROVIDED IS SUFFICIENT

19. beIN filed the December 13 complaint to address the Bureau's concern that the March 2018 complaint did not present a sufficient degree of certainty about the programming beIN would feature. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

³⁰ Complaint ¶¶ 52, 66.

³¹ *Id.* ¶¶ 48, 50. [[BEGIN CONFIDENTIAL]]

CONFIDENTIAL]] Meyeringh Reply Decl. ¶ 6.

³² Complaint ¶ 50.

³³ *Id.* ¶¶ 48, 61. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

³⁴ Complaint ¶ 48.

³⁵ Declaration of Eric Sahl ¶¶ 5-10, attached as Exhibit 10 to the Complaint.

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20. Comcast does not persuasively rebut this evidence. As beIN's industry expert Mr. Sklar and Dr. Singer observe, Comcast effectively admits that its NBC Sports affiliate offers less certainty to distributors than beIN has provided Comcast.³⁶ {{BEGIN HCI}}

³⁶ Singer Decl. ¶ 65; *see* Sklar Decl. ¶¶ 7-8.

³⁷ Sklar Decl. ¶ 5.

³⁸ *Id.* ¶ 6.

³⁹ *Id.* ¶¶ 6-7.

{{END HCI}}

⁴⁰ *Id.* ¶ 8.

⁴¹ Complaint ¶ 7.

⁴² Sklar Decl. ¶ 8; *see* Singer Decl. ¶ 65.

⁴³ Litman Suppl. Decl. ¶ 20.

⁴⁴ Sklar Decl. ¶ 8.

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25. Comcast’s argument that NBC Sports is an established network, so it can get away with less specificity is meritless.⁴⁵ NBCUniversal’s market power as a broadcast conglomerate is what enables it to get away with lesser assurances.⁴⁶ For other MVPDs, even large ones, to obtain access to this programming, they must acquiesce to carrying the rest of NBC’s programming.⁴⁷ It should not then be able to use that discriminatory behavior as a basis for further discrimination. Additionally, Comcast’s prized rights, the EPL rights, were only obtained in 2013.⁴⁸ It cannot plausibly claim that somehow its rights are more guaranteed than beIN’s rights when it has had its rights for even less time.

26. As Mr. Sklar explains, Mr. Litman’s implication that NBC Sports’ trustworthiness in the marketplace allows it to get away with lesser assurances is also wrong.⁴⁹ Mr. Litman fails to provide examples to support his claim that NBC Sports has a “better reputation for its programming, production, and promotion expertise” than beIN.⁵⁰ beIN holds the rights to the top European soccer league, La Liga, as well as the popular French Ligue 1. beIN has [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Further, beIN, like NBC Sports, has a powerful economic incentive

⁴⁵ Litman Suppl. Decl. ¶ 19.

⁴⁶ Sklar Decl. ¶ 9.

⁴⁷ *Id.* ¶ 9.

⁴⁸ Tom Teodorczuk, *How NBC Sports is Monetizing Its \$1 Billion Premier League Soccer Investment*, Market Watch (Dec. 19, 2017), <https://www.marketwatch.com/story/how-nbc-sports-is-monetizing-its-1-billion-premier-league-soccer-investment-2017-12-14>.

⁴⁹ Sklar Decl. ¶¶ 9-10.

⁵⁰ Litman Suppl. Decl. ¶ 19.

⁵¹ Complaint ¶ 52.

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to secure advertising revenues.⁵² Mr. Litman does not support his contention that beIN is much more reliant on affiliate revenue than NBC Sports, nor does he explain why such supposed reliance affects beIN's trustworthiness.⁵³ Mr. Litman's focus on the shuttering of a network affiliated with beIN ignores that certain of NBC Sports' sister networks have also been shut down.⁵⁴

27. [[BEGIN CONFIDENTIAL]]

⁵² Sklar Decl. ¶ 10.

⁵³ Litman Suppl. Decl. ¶ 19.

⁵⁴ Sklar Decl. ¶ 11; *see* Cynthia Littleton, *NBCUniversal Cable to Shutter Chiller Channel*, Variety (Nov. 16, 2017), <https://variety.com/2017/tv/news/nbcuniversal-shutter-chiller-cable-channel-1202616649/>.

⁵⁵ Sahl Reply Decl. ¶ 5.

⁵⁶ Complaint ¶ 52.

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[[END CONFIDENTIAL]]

28. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

29. [[BEGIN CONFIDENTIAL]]

⁵⁷ Meyeringh Reply Decl. ¶ 5.

⁵⁸ *Id.*

⁵⁹ Singer Decl. ¶ 58.

⁶⁰ *See* Lerner Suppl. Decl. ¶ 6.

⁶¹ Singer Decl. ¶ 58.

⁶² *Id.*

⁶³ Reply Declaration of Eric Sahl ¶ 4, attached as Exhibit 4 (“Sahl Reply Decl.”).

⁶⁴ Meyeringh Reply Decl. ¶ 7.

[[END

CONFIDENTIAL]]

30. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

31. Mr. Sahl also testified that the like-for-like clause should provide more, not less, assurance for Comcast in a live-sports programming world with a variety of inherent uncertainties beyond both the right-holder's and distributor's control, such as the relocation of franchises, player trades, player contracts, player injuries, labor strikes, and player performance variation.⁶⁹ Soccer stars can, and often do, move from one national league to another, and they score, dribble, or scissor-kick more or less spectacularly depending on the season.⁷⁰ [[BEGIN

⁶⁵ See Lerner Suppl. Decl. ¶ 14.

⁶⁶ Meyeringh Reply Decl. ¶ 7.

⁶⁷ Lerner Suppl. Decl. ¶ 14.

⁶⁸ See Singer Decl. ¶ 57.

⁶⁹ Sahl Reply Decl. ¶ 6.

⁷⁰ Complaint ¶ 63. Lionel Messi was “off the ball” in 2016, and “more important than ever” again in 2019. *Compare Lionel Messi is Suffering His Worst Scoring Drought in Six Years*, Off

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[[END CONFIDENTIAL]] For Comcast, this bounded flexibility mitigates the risk of being stuck with a league whose major stars are gone.

32. The rights beIN offered were sufficiently specific and certain enough to protect Comcast for many additional reasons. beIN is a tried-and-true crowd-pleasing network; beIN has achieved a reputation as a destination network, lending some brand equity to the platform; beIN has distribution relationships with other major distribution platforms in the US and hence is already obligated to deliver the product to other partners, further ensuring the quality of the content.⁷¹

33. Comcast's claims that beIN could replace programming with "sports and non-sports content" is unfounded. [[BEGIN CONFIDENTIAL]]

the Ball (Apr. 14, 2016), <https://www.offtheball.com/soccer/lionel-messi-is-suffering-his-worst-scoring-drought-in-six-years-274756>, with Joshua Robinson, *Lionel Messi is More Important than Ever*, Wall Street Journal (Apr. 17, 2019), <https://www.wsj.com/articles/lionel-messi-is-more-important-than-ever-11555495200>.

⁷¹ Complaint ¶ 64.

⁷² Sahl Reply Decl. ¶ 4.

⁷³ Complaint ¶ 52.

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34. Dr. Lerner's suggestion that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] First

of all, any like-for-like constraint is better than none; as we now know, {{BEGIN HCI}}

{{END HCI}} Furthermore, as Dr. Singer notes, [[BEGIN
CONFIDENTIAL]]

[[END CONFIDENTIAL]]

35. [[BEGIN CONFIDENTIAL]]

⁷⁴ Singer Decl. ¶ 64.

⁷⁵ Litman Suppl. Decl. ¶ 20.

⁷⁶ Singer Decl. ¶ 64.

⁷⁷ Singer Decl. ¶ 64.

⁷⁸ *Id.* ¶ 53.

[[END

CONFIDENTIAL]] In any event, Comcast's belated testimony about NBC Sports' high-handed practices in its dealings with distributors is clear evidence of certainty concerning beIN's terms on the enriched record of this proceeding.

36. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] suggesting that the duration of NBCUniversal's rights for NHL, NASCAR, Olympics, and EPL is widely known.⁸³ Dr. Lerner fails to support his contention about the wide knowledge of NBCUniversal's rights with any evidence. Further, such knowledge is not relevant. As discussed, beIN provided Comcast with [[BEGIN

⁷⁹ *Id.*

⁸⁰ Singer Decl. ¶ 55; *see* Lerner Suppl. Decl. ¶ 12.

⁸¹ Singer Decl. ¶ 55.

⁸² *Id.*

⁸³ Lerner Suppl. Decl. ¶ 9.

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37. With respect to Serie A rights, one of Comcast's witnesses issues a narrowly circumscribed denial of beIN's account, stating that beIN did not "stress that its Serie A rights 'were a question mark.'"⁸⁴ This leaves open the possibility that beIN made the comment in substance though not verbatim and that the point was made but not "stressed." In any event, another part of that witness' testimony confirms the substance of beIN's account by denying a strawman and stating only that "beIN never definitively stated that it would be losing Serie A rights."⁸⁵

38. [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] And the provision of games to Verizon Wireless, meanwhile, a non-wireline distributor, even at potentially lower rates, does not threaten or diminish the value of

⁸⁴ Brayford Decl. ¶ 13.

⁸⁵ *Id.* ¶ 56.

⁸⁶ Answer ¶ 52; Litman Suppl. Decl. ¶ 11.

⁸⁷ Singer Decl. ¶ 67.

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Comcast’s wireline video-service offering.⁸⁸ Viewing hours-long soccer matches is inherently more difficult on a smaller screen; thus, few customers, if any, would cancel either Comcast’s Sport and Entertainment tier, or Comcast altogether, to watch live soccer programming through the go90 app.⁸⁹ Comcast’s attempt to thwart rival distribution technologies is also anti-competitive.⁹⁰ In any event, as Comcast recognizes, Verizon Wireless has shut down go90.⁹¹

V. beIN AND beIN EN ESPAÑOL ARE SIMILARLY SITUATED TO NBC SPORTS AND UNIVERSO

39. The showing required by the rules is that the complainant’s *programming* is similarly situated to that of a vendor affiliated with the distributor.⁹² Although Comcast argues that beIN “bears the burden of proof to establish that its *networks* are ‘similarly situated’ to NBCSN and Universo,” this is incorrect.⁹³ While it is convenient to refer to “networks” in a similarly situated analysis, Comcast’s argument finds no support in the language in the statute or the Commission’s rules.

40. In any event, both the programming lineups and the networks are similarly situated (beIN with NBC Sports, beIN en Español with Universo) in this case. beIN will refer interchangeably to programming lineups and networks in its similarly situated analysis.

⁸⁸ *Id.* ¶ 68.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Litman Suppl. Decl. ¶ 11 n.6.

⁹² 47 C.F.R. § 76.1301(c) (“No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”).

⁹³ Answer ¶ 18 (emphasis added).

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A. Comcast’s Actions Demonstrate that the Networks are Similarly Situated.

41. Comcast’s competition with beIN for soccer and other sports programming rights demonstrates that the beIN networks are similarly situated to NBC Sports and Universo.

[[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] It goes to the heart of the concern that “cable operators have the incentive and ability to favor their affiliated programmers,” which inspired Congress to enact the program carriage rules.⁹⁴ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

42. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Here is the discussion in its entirety:

beIN’s claim that NBCUniversal has [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] is specious. Second Compl. ¶ 126. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]].

43. There is no stronger evidence of similarly situated status than two programmers vying to secure the same content. In *Tennis Channel*, for example, the Commission gave

⁹⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁹⁵ Answer ¶ 52 n.149.

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significant weight to the fact that Tennis Channel and Versus “have a history of repeatedly sharing or seeking rights to the same sporting events” when finding that the two networks were similarly situated.⁹⁶ More recently, in *Game Show Network*, the Commission again closely examined evidence of “competition between GSN and WE tv in vying for rights to the same programming” when undertaking its similarly situated analysis.⁹⁷ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

44. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] As

noted in the Complaint, beIN and Comcast also previously competed for rights to the EPL, which as Dr. Singer recognizes, is itself a competing league to La Liga.⁹⁹ Also, as in *Tennis Channel*, where the Tennis Channel and Versus shared television rights to the U.S. Davis Cup,¹⁰⁰ beIN and Comcast’s subsidiaries also broadcast some of the *same* soccer events.¹⁰¹ In the United States, the 2017 CONCACAF World Cup Qualifiers were televised by beIN in English and by Telemundo and Universo in Spanish, while NBC Sports carries the popular Rugby Six Nations

⁹⁶ *Tennis Channel MO&O*, 27 FCC Rcd. at 8527 ¶ 52.

⁹⁷ *GSN MO&O*, 32 FCC Rcd. at 6176 ¶ 51.

⁹⁸ *Tennis Channel, Inc. v. Comcast Cable Communications, Initial Decision of Chief Administrative Law Judge Richard L. Sippel*, 26 FCC Rcd. 17160, 17171 ¶ 26 (2011) (“*Tennis Channel ALJ Decision*”).

⁹⁹ Singer Decl. ¶ 42.

¹⁰⁰ *Tennis Channel ALJ Decision*, 26 FCC Rcd. at 17171 ¶ 26.

¹⁰¹ Singer Decl. ¶ 43.

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Championship, which beIN formerly carried.¹⁰² beIN has also acquired rights to the 2019 Copa Libertadores tournament; Telemundo had the rights to the finals of the 2018 tournament.¹⁰³ Furthermore, while NBC Sports broadcasts the EPL in the United States, beIN owns the rights to broadcast the EPL in various other countries.¹⁰⁴

B. Comcast Sets the Bar So High that No Two Programming Lineups Would Ever Be Similarly Situated.

45. The programming lineups of the four networks are similarly situated because sports programming in general, and soccer in particular, is by Comcast’s admission a top marquee attraction for NBC Sports and Universo. Such marquee programming, although only a fraction of the networks’ total content, plays a disproportionately important role because it does the heavy lifting in driving viewership and advertising.¹⁰⁵ To divert attention from this uncanny resemblance, and immunize itself from discrimination claims both now and in the future, Comcast tries to slice the programming provided by those networks into categories so thin that no two programming lineups would ever be found to be similarly situated.¹⁰⁶ This recycled argument from prior program carriage complaint proceedings has already been repeatedly rejected by the Commission.¹⁰⁷

¹⁰² Complaint ¶¶ 97, 111.

¹⁰³ Briceño Reply Decl. ¶ 19; *see Copa Libertadores Final to Air on Telemundo In the US*, SportsPro (Dec. 6, 2018), <http://www.sportspromedia.com/news/copa-libertadores-final-telemundo-tv-rights>.

¹⁰⁴ Singer Decl. ¶ 43.

¹⁰⁵ *Id.* ¶ 41.

¹⁰⁶ *Id.* ¶¶ 36, 45.

¹⁰⁷ *Tennis Channel MO&O*, 27 FCC Rcd. at 8528 ¶ 58 (finding that Comcast’s arguments about distinctions in programming between the Tennis Channel, and Comcast-affiliated Versus and the Golf Channel are not “as significant as Comcast presents them to be”); *NFL Enterprises LLC*,

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46. Comcast cannot persuasively deny the essential common thread running through the programming of beIN and NBC Sports; they are focused, exclusively (NBC Sports) or heavily (Universo), on sports programming.¹⁰⁸ NBC Sports bills itself as “dedicated to serving passionate sports fans. Together, the Emmy Award-winning networks [NBC Sports and NBC Sports Network] are the home of the Summer and Winter Olympics, National Hockey League (NHL), Premier League, Formula One, IndyCar (NBCSN), Tour de France, Premier Boxing Champions and beginning in 2015, NASCAR.”¹⁰⁹ NBC Sports is part of NBC Sports Group, which describes itself as serving “fans 24/7 with premier live events, insightful studio shows, and compelling original programming.”¹¹⁰

47. As for Universo, Comcast does astonishingly deny its sports nature when it says that “it is not a sports network.” That would be news to Universo itself, which has emphatically described itself as what Comcast has denied it is: a “sports and entertainment” network.¹¹¹ Sure, the network offers non-sports programming, too, such as reality shows and telenovelas. But its statements about itself and its marketing literature leave no doubt that Spanish language sports is its lodestar. Thus, Universo “delivers in Spanish language a thrilling mix of exclusive sports

Complainant v. Comcast Cable Communications, Defendant, *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14823 ¶ 75 (2008) (“Comcast appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.”) (*NFL HDO*).

¹⁰⁸ See Answer ¶ 21 (“NBCSN is a general multi-sport network.”).

¹⁰⁹ NBCSN, NBC Universal, <http://www.nbcuniversal.com/business/nbc-sports-network-nbc-sn> (last visited May 5, 2019).

¹¹⁰ *About NBC Sports Group*, NBC Sports Group Press Box, <http://nbcSPORTSGROUPPRESSBOX.COM/about/> (last visited May 5, 2019).

¹¹¹ *Why mun2 Is Now NBC Universo*, NBCUniversal, (Feb. 2, 2015), <http://www.nbcuniversal.com/article/why-mun2-now-nbc-universo>.

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action – including FIFA World Cup™, NASCAR Mexico Series, NFL, Premier League and the 2016 Olympic Summer Games in Rio – along with signature series, blockbuster movies, music, must-see live events and strategic acquisitions, on TV, online and mobile devices.”¹¹² Its Facebook cover photo touts the fact that it has the rights to Spanish-language World Cup games. Moreover, Universo has specifically targeted Hispanic audiences through its addition of Liga MX soccer games.¹¹³ As NBC itself has boasted, Universo is “built on a solid foundation of sports featuring some of the world’s best franchises.”¹¹⁴

48. Again repeating arguments that it made in its prior answer, Comcast claims that the programming is distinct because “less than 10 percent of NBCSN’s programming minutes consisted of soccer programming”¹¹⁵ It makes a similar argument for Universo, noting that 88.2% of its programming consisted of non-sports programming.¹¹⁶

¹¹² *Universo*, NBC Universal, <http://www.nbcuniversal.com/business/NBCUniverso> (last visited May 5, 2019).

¹¹³ Juan Fernandez Gonzalez, *Telemundo, NBC Target Hispanics with Mexico’s Liga MX*, Rapid TV News (July 18, 2015), <https://www.rapiddtvnews.com/2015071839117/telemundo-nbc-target-hispanics-with-mexico-s-liga-mx.html#axzz5GMrBP6E9>.

¹¹⁴ *NBC Universo Announces Highlights of Its Upcoming Sports & Entertainment Lineup*, Comcast (May 15, 2015), <https://corporate.comcast.com/news-information/news-feed/nbc-universo-announces-highlights-of-its-upcoming-sports-entertainment-lineup> (“‘Viewers can tune into NBC Universo for blockbuster movies, edgy entertainment, music and big events — all built on a solid foundation of sports featuring some of the world’s best franchises,’ said Rubén Mendiola, President, NBC Universo. . . . From the studio to the field, NBC Universo will build upon its great soccer lineup that currently includes Premier League and FIFA World Cup™. Starting this fall, the channel will become the home to some of the best Liga MX competition. NBC Universo will exclusively air all of the home games for León and Pachuca every Saturday night. Viewers will be able to experience all the teams of Liga MX as they visit Estadio León and Estadio Hidalgo under the lights. Also, NBC Universo will air key qualifying matches for CONCACAF and the 2016 Rio Summer Olympics beginning later this year.”).

¹¹⁵ Answer ¶ 26.

¹¹⁶ *Id.*

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49. These arguments are as unavailing now as they were in the prior proceeding. Both NBC Sports and Universo hold out soccer as featured programming.¹¹⁷ That these networks also show non-soccer or non-sports programming, even most of the time, does not undercut the importance of soccer to these networks. Soccer, Comcast notes, represents a significant ten percent of Universo’s top-rated programming.¹¹⁸ This common focus on soccer programming with beIN en Español is a far cry from the “enormous overall differences in programming” that the Commission found in *GSN*, where only a handful of shows on GSN broadly “involved ‘relationship’ elements” resembling a few shows shown on Cablevision-affiliated WE tv.¹¹⁹ Unlike “relationships,” “which is a common theme that occurs across many genres . . . rather than a genre itself[,]”¹²⁰ soccer is a concrete and specific sub-genre of sports programming.¹²¹ That Universo provides significant non-sports programming does not somehow invalidate the focus of both Universo and beIN en Español on soccer.

50. Additionally, especially for NBC Sports, Comcast’s argument runs directly into the teeth of Commission precedent.¹²² The Commission has found that a sports network providing only football is similarly situated to a sports network that provides only golf, with zero overlap as to the kinds of sports each covers. This is precisely the holding in *NFL HDO*: the

¹¹⁷ *Id.* at Exhibits 6 & 9.

¹¹⁸ *Id.* ¶ 28.

¹¹⁹ *See GSN MO&O*, 32 FCC Rcd. at 6176 ¶ 50.

¹²⁰ *Id.*

¹²¹ Briceño Reply Decl. ¶ 8.

¹²² *NFL HDO*, 23 FCC Rcd. at 14823 ¶ 75 (“Comcast appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.”).

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Media Bureau found that the programming of the NFL Network was similarly situated to that of the Golf Channel and Versus (now NBC Sports), because all three lineups belong to the genre of national sports, with the three networks competing for programming rights, advertisers and viewers.¹²³ The Commission made a similar finding in *Tennis Channel*, where it found that a network focused exclusively on niche tennis to be similarly situated to Versus, which carried an array of sports programming (but *not* tennis).¹²⁴ It follows *a fortiori* that two networks that cover overlapping types of sports must be similarly situated. This is the case here: NBC Sports shows soccer games just as beIN does, and beIN features motor sports, rugby, and college sports games just as NBC Sports does. As discussed in the Complaint,¹²⁵ the quote from Jon Miller, the President of NBC Sports and NBC Sports Network, invoked by Comcast to show that NBC Sports is not centered on soccer unwittingly betrays the opposite—that NBC Sports is even more narrowly focused on one soccer league.¹²⁶

C. The Four Networks Have Similar Audiences.

51. Comcast repeats its argument that the audience and ratings demonstrate that the networks are not similarly situated, stating that “beIN likewise fails to provide any credible evidence that its networks materially compete with NBCSN or Universo for viewers.”¹²⁷ In trying to draw a distinction between beIN’s audience and Comcast’s affiliated networks’ audiences, Comcast uses the same arguments from its initial answer. For instance, Comcast

¹²³ *Id.* at 14822 ¶ 75.

¹²⁴ *Tennis Channel MO&O*, 27 FCC Rcd. at 8527 ¶ 52; Singer Decl. ¶ 35.

¹²⁵ Complaint ¶ 73.

¹²⁶ Answer ¶ 22 n.68.

¹²⁷ *Id.* ¶ 29.

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relies upon the fact that beIN attracts a younger and more bilingual audience than NBC Sports, while 47 percent of the viewers of NBC Sports are over 55.¹²⁸ Yet, as beIN pointed out then, by Comcast's own numbers, over half of the audience for NBC Sports is under 55.

52. Comcast repeats another error when it attempts to compare beIN en Español and Universo. After declaring slight age differences as dispositive when comparing beIN to NBC Sports, Comcast falls curiously silent on age when it shifts to comparing beIN en Español to Universo. According to Comcast, it is now differences in gender breakdown that are dispositive for the Spanish-language channels.¹²⁹ Yet, in both cases, the majority of the audiences ([BEGIN CONFIDENTIAL]) are male. Comcast is merely arguing over a difference in degree, not in kind. Just as important, Comcast's lapse into silence on age is easy to understand. The median age is almost the same—[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]].¹³⁰

53. All in all, Comcast's allegation that beIN's demographics skew toward more affluent and younger viewers is plainly wrong.¹³¹ The numbers do not tell Comcast's story. For 2018, the viewers of both beIN and NBC Sports [BEGIN CONFIDENTIAL]

¹²⁸ *Id.* ¶ 30.

¹²⁹ *Id.*

¹³⁰ Briceño Reply Decl. ¶ 12.

¹³¹ Answer ¶ 30.

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[[END CONFIDENTIAL]] This is hardly the rich/poor picture painted by Comcast. In other words, the audiences of beIN and NBC Sports are substantially similar, with some metrics indicating that NBC Sports has the more affluent audience. Median incomes, too, between the networks are similar, with both networks having audiences that are likely to hold blue collar jobs.

54. Dr. Lerner’s focus on demographic differences to suggest the networks are not similarly situated is misplaced.¹³³ Indeed, he appears to go as far as to say that differences on a single dimension would render two networks dissimilar. Practically, no two networks are identical; rather, networks distinguish themselves in order to compete with, counter, and differentiate themselves from other similarly situated networks, while still remaining similarly situated to those networks.

55. Comcast tries to argue again that “most soccer fans are unlikely to view the various international leagues as substitutes for one another.”¹³⁴ To prove this, it states that [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of NBC Sports viewers also viewed beIN, [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of Universo viewers also watched beIN, and that there were [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] other Spanish-language networks that shared more viewers with Universo than beIN in Español.¹³⁵

¹³² See beIN Comcast Competition Profile, attached as Exhibit 7; Briceño Reply Decl. ¶ 13.

¹³³ Singer Decl. ¶ 40 n.60; see Lerner Suppl. Decl. ¶ 34.

¹³⁴ Answer ¶ 31.

¹³⁵ *Id.*

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56. Comcast has once again bootstrapped the more favorable distribution deals its affiliated networks enjoy, including from Comcast itself, to claim that no independent network could ever be similarly situated to any Comcast network. Comcast's discussion of viewership overlap is uninformative,¹³⁶ as it *fails to consider whether those same customers have access to beIN and beIN en Español*.

57. Comcast does not dispute these facts except by stating that "beIN's data on the percentage of beIN viewers that also watch NBCSN or Universo are misleading, because that simply reflects the popularity of NBCSN and Universo, not similarity."¹³⁷ This self-serving statement receives no further explanation or justification in Dr. Lerner's declaration.¹³⁸ Further, Comcast fails to show that the lack of substitutability of two leagues in the mind of viewers renders different networks showing those leagues not similarly situated. For example, American League baseball fans may not view watching the National League as a substitute, but this does not mean that a network showing American League games and a different network showing National League games are not similarly situated. Fundamentally, because beIN and beIN en Español are available to significantly fewer households than NBC Sports,¹³⁹ it is misleading to claim that "only" [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of NBC Sports viewers also view beIN.¹⁴⁰ It is more appropriate to look only at households where both networks are available. The available evidence indicates a significant degree of overlap in

¹³⁶ Singer Decl. ¶ 47.

¹³⁷ Answer ¶ 31 n.97.

¹³⁸ See Lerner Suppl. Decl. ¶¶ 30-31.

¹³⁹ Briceño Reply Decl. ¶ 14; Litman Suppl. Decl. ¶ 31 (noting NBC Sports is available to over [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] million households).

¹⁴⁰ Answer ¶ 31.

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viewership between beIN and NBCSN on the one hand, and beIN en Español and Universo on the other.¹⁴¹ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] of beIN viewing households also watched NBC Sports.¹⁴² And the trend is upwards. For 2018, the number is [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]].¹⁴³ The data are similar between beIN en Español and Universo. For the same periods, more than [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] and [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of beIN en Español viewing households also watched Universo.¹⁴⁴ In 2018, the overall overlap between the four networks was [[BEGIN CONFIDENTIAL]]⁵ [[END CONFIDENTIAL]] The overlap between the networks' viewers is illustrated in the chart below.

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¹⁴¹ Singer Decl. ¶ 27.

¹⁴² Complaint ¶ 90.

¹⁴³ Briceño Reply Decl. ¶ 14. This differs somewhat from the percentages provided by Dr. Lerner, who stated that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

Lerner Suppl. Decl. ¶¶ 30-31.

¹⁴⁴ Complaint ¶ 90.

¹⁴⁵ Briceño Reply Decl. ¶ 14.

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58. That NBC Sports and Universo have a greater audience overlap with some other networks is hardly indicative of a lack of similarity, given all of the possible network pairings Dr. Lerner could have performed.¹⁴⁶ Rather, the substantial overlap of beIN and beIN viewers that have watched NBC Sports and Universo, respectively, suggests similarly situated status. The networks with greater audience overlap may also be similarly situated; these are not mutually exclusive possibilities.¹⁴⁷

D. The Relevant Ratings Comparison Shows beIN and beIN en Español to Be Comparable to, or More Popular than, NBC Sports and Universo.

59. In attempting to distinguish its affiliated networks from the beIN networks, Comcast relies on ratings from the first half of 2018 that are unadjusted for the size of the audience to which each network has access. But Comcast itself dramatically affected these ratings by [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Ratings comparisons that are not adjusted for the dramatic difference in the number of people who could view a program if they want to are akin to comparing apples

¹⁴⁶ Lerner Suppl. Decl. ¶¶ 30-31; Singer Decl. ¶ 36.

¹⁴⁷ Singer Decl. ¶ 46.

¹⁴⁸ See Briceño Reply Decl. ¶ 15; SNL Kagan, Comcast Packages 4Q 2017 (last accessed May 30, 2018).

¹⁴⁹ See Briceño Reply Decl. ¶ 15; SNL Kagan, Comcast Packages 4Q 2017 (last accessed May 30, 2018).

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and oranges. Relying on such comparisons to hold that two programming lineups are not similarly situated is tantamount to giving Comcast the unchecked power of self-pardon. Dr. Singer explains that, as a consequence of not controlling for the total number of households that can receive it, “beIN’s national-level ratings are endogenous to Comcast’s decision not to distribute beIN more broadly—and ultimately to drop it—and also to other distributors’ response to Comcast’s challenged conduct.”¹⁵⁰

60. For this reason, Comcast’s comparison of unadjusted ratings should be disregarded. For example, Comcast distinguishes the ratings for NBC Sports from the ratings for beIN by stating that NBC Sports “draw[s] 27 times the average viewing audience of beIN sports in the first half of 2018, an even greater multiple than in 2017 when NBCSN drew more than 10 times the average viewing audience of beIN Sports.”¹⁵¹ This time frame, though, is significantly biased in favor of NBC Sports. Comcast’s own expert concedes that “[t]his substantial increase in the first half of 2018 can be explained by the Winter Olympics telecast offered by NBCSN, as well as a drop in ratings for beIN Sports.”¹⁵² No effort is made by Dr. Lerner to demonstrate that beIN’s ratings have in fact declined or to determine the ratings for NBC Sports without the outsized influence of the Olympics. Without these adjustments, Dr. Lerner’s analysis is misleading and should be discounted.

61. For a similar reason, Comcast’s analysis of NBC Sports’ top-rated programming is wrong. Comcast repeatedly attempts to distinguish NBC Sports from beIN by stating that

¹⁵⁰ Singer Decl. ¶ 44.

¹⁵¹ Answer ¶ 32.

¹⁵² Lerner Suppl. Decl. ¶ 27.

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NBC Sports' marquee programming does not contain much soccer programming.¹⁵³ But the data relied upon by Comcast are an outlier because the Olympics dominated the top-rated programming for NBC Sports.¹⁵⁴ Even in an era with declining viewership of all programming, the Olympics remain a ratings bonanza.¹⁵⁵ The ratings are so large that they skew NBC Sports' overall ratings, rendering any comparison suspect.¹⁵⁶

62. The top-rated programming on NBC Sports is also skewed because it is [[BEGIN CONFIDENTIAL]]

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63. Another reason why soccer may not appear in the top-rated programs for NBC Sports is that Comcast frequently moves marquee games to NBC to gain the largest possible

¹⁵³ Answer ¶¶ 27-28.

¹⁵⁴ *Id.* ¶ 28.

¹⁵⁵ Joe Otterson, *2018 Winter Olympics Close Out as Least-Watched on Record, Down 7% from Sochi Games*, Variety (Feb. 26, 2018), <https://variety.com/2018/tv/news/2018-winter-olympics-ratings-2-1202710137/> (“The Pyeongchang Olympics were still the top-rated program on TV for more than two weeks, beating CBS, ABC, and Fox combined. The NBC-only primetime average viewership of 17.8 million surpassed Fox, CBS, and ABC combined by an average of 82%, the largest such advantage for any Winter Games.”).

¹⁵⁶ *Id.* (“In addition, NBC Sports Network is on pace for its best month ever. Based on available data through Feb. 25, the cable network is averaging 768,000 total day viewers.”).

¹⁵⁷ Litman Suppl. Decl., Exh. 1.

¹⁵⁸ See Paulsen, *Stanley Cup Final Most-Watched in Three Years*, Sports Media Watch (June 8, 2018), <https://www.sportsmediawatch.com/2018/06/stanley-cup-final-ratings-viewership-nbc-nbcns/>.

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audience. For instance, the February 23, 2019 match between Leicester City and Crystal Palace aired on NBC, while the other Premier League games that day aired on NBC Sports or NBC Sports Gold.¹⁵⁹ The top-rated Premier League game of the 2017-2018 season, the Manchester derby on April 7, 2018, was broadcast on NBC.¹⁶⁰ Had it been aired on NBC Sports, it would have likely been among the top-rated program on the network.

64. Finally, Comcast cannot on the one hand claim that soccer does not dominate its ratings while at the same time issuing press releases celebrating the fact that “[s]ince the Premier League season kicked off on Aug. 17, NBCSN has posted a 67 percent increase in average total day viewership – tops among any sports cable network. NBCSN’s Premier League telecasts are averaging 391,000 viewers – a 70 percent jump over the average posted by ESPN, ESPN2 and Fox Soccer after five weeks last year (230,000).”¹⁶¹ The 2017-2018 Premier League season was also a record season for Comcast, including the largest American audience ever for a Premier League game.¹⁶² At a time when even sports ratings are declining, soccer ratings are increasing, making soccer an even more important part of Comcast’s portfolio.

¹⁵⁹ *Premier League TV Schedule and Streaming Links*, World Soccer Talk, ([archived at https://web.archive.org/web/20190219045828/http://worldsoccertalk.com/premier-league-tv-schedule/](https://web.archive.org/web/20190219045828/http://worldsoccertalk.com/premier-league-tv-schedule/)).

¹⁶⁰ *Record 39.3 Million Americans Tuned into NBC Sports’ Coverage of 2017-18 Premier League Season on the Networks of NBCUniversal*, NBC Sports Group (May 17, 2018), <http://nbcsportsgrouppressbox.com/2018/05/17/record-39-3-million-americans-tuned-into-nbc-sports-coverage-of-2017-18-premier-league-season-on-the-networks-of-nbcuniversal/>.

¹⁶¹ *Premier League Pushing Huge Viewership Gains for NBC Sports Group*, Comcast, <https://corporate.comcast.com/news-information/news-feed/premier-league-pushing-huge-viewership-gains-for-nbc-sports-group> (last visited May 5, 2019).

¹⁶² *Record 39.3 Million Americans Tuned into NBC Sports’ Coverage of 2017-18 Premier League Season on the Networks of NBCUniversal*, NBC Sports Group (May 17, 2018), <http://nbcsportsgrouppressbox.com/2018/05/17/record-39-3-million-americans-tuned-into-nbc-sports-coverage-of-2017-18-premier-league-season-on-the-networks-of-nbcuniversal/>.

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1. *Coverage area ratings demonstrate that beIN's ratings are comparable to Comcast's affiliated networks.*

65. Coverage area ratings are a useful metric because they examine how well a network does when measured against the universe of its own base.¹⁶³ Thus, that metric tends to level the playing field between a network with fewer than 20 million subscribers and a network with over 80 million subscribers.

66. Coverage area ratings demonstrate that both beIN and beIN en Español compare favorably with NBC Sports and Universo. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]. Comcast's coverage area ratings, which allegedly show that beIN's coverage area ratings have declined, are based on a non-standard sample.¹⁶⁷

67. Comcast's criticism of the coverage ratings—that they are meaningless in predicting ratings when a programmer is given broad distribution—is unsupported speculation shown to be false by a study conducted by beIN. beIN has studied its ratings over time in the

¹⁶³ See Singer Decl. ¶ 44.

¹⁶⁴ Complaint ¶ 91.

¹⁶⁵ Briceño Reply Decl. ¶ 17.

¹⁶⁶ *Id.* ¶ 17.

¹⁶⁷ Litman Suppl. Decl. ¶ 34.

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Dallas market, where it was given broader distribution by Charter's predecessor Time Warner in 2014. beIN's unadjusted ratings grew demonstrably and significantly upon the broadening of its distribution base and continued to grow at a pace that was more than six fold between June 2014 and June 2015. Thus, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

68. Further, Comcast argues that “[t]he households that subscribe to the specialty sports and Spanish-language packages on which the beIN networks are typically carried (and that are captured by coverage area ratings) have disproportionately large numbers of sports fans and Latinos that are more likely than the overall population to watch the beIN networks.”¹⁶⁹ While there may be some specialty package viewers who purchase that package, in whole or in part, to watch soccer, there are many who do not. Comcast does not claim otherwise or seek to quantify the two categories of viewers; it merely resorts to dubious ethnic stereotyping. So Comcast's argument is no more than a claim that when you confine a network to a specialty package of comparatively few networks, its ratings among the viewers of this package can, and should, be disregarded. But disregarding such coverage ratings would render a rating analysis impossible for networks placed on specialty tiers, precisely the outcome Comcast seeks.

69. Comcast sets up a strawman when Mr. Litman argues that there is “a mathematical certainty that beIN would not rate as highly if it were in a universe that had

¹⁶⁸ Briceño Reply Decl. 18.

¹⁶⁹ Answer ¶ 33.

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proportionately fewer Latinos and sports fans.”¹⁷⁰ In context, the words “mathematical certainty” are a rather transparent euphemism for a lack of empirical data. And, if Mr. Litman were correct, this would prove nothing of relevance. Even assuming that the ratings of beIN would indeed be diluted somewhat if it were carried more broadly, beIN’s non-coverage-adjusted ratings would be better because of the broader distribution itself. These ratings would improve even if one viewer who now does not have access to a beIN game decided to watch a single game.

70. Finally, Comcast’s attempt to dismiss beIN’s ratings among sports specialty viewers is even weaker, indeed absurd, because both beIN and NBC Sports provide sports programming. Comcast is essentially arguing that the greater popularity of beIN than NBC Sports among sports package viewers should be ignored because sports viewers naturally skew toward sports. But that is what NBC Sports, too, provides. Sports viewers are the best jury for the popularity of both beIN and NBC Sports. Literally, beIN rivals NBC Sports at its own game.

71. Dr. Lerner claims coverage rating comparisons are inappropriate because sports tier viewers (where beIN is frequently carried) are predisposed to watching sports, and broader distribution of beIN and beIN en Español could dilute these statistics.¹⁷¹ As Dr. Singer explains, this is another strawman argument that misses the point, which is that the ratings data unadjusted for distribution say little about whether the networks at issue are similarly situated given the incumbency advantage of cable-affiliated networks.¹⁷²

¹⁷⁰ *Id.*

¹⁷¹ Lerner Suppl. Decl. ¶ 28.

¹⁷² Singer Decl. ¶ 44.

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2. *Another Useful Metric*

72. [[BEGIN CONFIDENTIAL]]

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73. [[BEGIN CONFIDENTIAL]]

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74. [[BEGIN CONFIDENTIAL]]

¹⁷³ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]].

¹⁷⁴ Sahl Reply Decl. ¶ 12.

¹⁷⁵ [[BEGIN CONFIDENTIAL]]

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75. [[BEGIN CONFIDENTIAL]]

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76. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]].

77. For Dr. Lerner, beIN and beIN en Español’s position as “niche” soccer networks make them not similarly situated to Comcast’s networks for the purposes of a program carriage dispute.¹⁷⁶ But this standard is inconsistent with the findings of the ALJ and the Commission in *Tennis Channel v. Comcast*, in which a network that focused exclusively on niche tennis was

¹⁷⁶ Answer ¶ 33 (emphasis in original).

¹⁷⁷ *Id.*

¹⁷⁸ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]].

¹⁷⁹ Lerner Suppl. Decl. ¶ 15.

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deemed similarly situated to Comcast's NBC Sports (then called Versus), which carried an array of sports programming (importantly, *not* including tennis).¹⁸⁰ Section 616 and the Commission's program carriage rules protect independent networks that are *similarly situated*, not *identically situated*.¹⁸¹ Indeed, the very nature of competition in cable programming compels cable network entrants to differentiate their products relative to incumbent offerings. If the standard were as exacting as Dr. Lerner and Mr. Litman assume, Comcast would be effectively immunized from the nondiscrimination constraint except in rare cases where competed with an identical clone to the independent network.¹⁸²

78. Moreover, Dr. Lerner and Mr. Litman do not reconcile their arguments that beIN and beIN en Español are "niche" soccer networks¹⁸³ with the simple fact that NBC Sports and Universo rely to a significant, and even increasing, extent on soccer programming.¹⁸⁴ By Dr. Lerner's own estimates, weighted by viewership, soccer makes up [[BEGIN CONFIDENTIAL]]

¹⁸⁰ See Singer Decl. ¶ 36 (citing *Tennis Channel MO&O*, 27 FCC Rcd. at 8511-15 ¶¶ 8-15).

¹⁸¹ Singer Decl. ¶ 36

¹⁸² *Id.*

¹⁸³ *Id.*; see Lerner Suppl. Decl. ¶ 15; Litman Suppl. Decl. ¶ 61.

¹⁸⁴ Singer Decl. ¶¶ 36, 42, 45; Briceño Reply Decl. ¶ 8.

¹⁸⁵ Lerner Suppl. Decl. ¶ 19.

[[END

CONFIDENTIAL]] Under Dr. Lerner’s proposed standard, the share of soccer programming apparently would have to converge for the two networks to be similarly situated.¹⁸⁷ This is inconsistent with the Commission’s decision in *Tennis Channel*, where it found that Versus was similarly situated to the Tennis Channel despite Versus showing zero tennis programming.¹⁸⁸

E. beIN and beIN en Español Directly Compete against NBC Sports/Universo for Advertisers.

79. Comcast again tries to dispute beIN’s substantial evidence that there is significant overlap in advertisers. In its answer to beIN’s first complaint, Comcast had initially disputed that the beIN and NBC networks compete for advertisers on the ground that they have only a handful of advertisers in common.¹⁸⁹ In its reply, beIN showed this was flatly untrue: the beIN and NBC networks share over [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] advertisers. This time around, Comcast is unable to rebut that number, and instead resorts to an economic argument based on a shibboleth of Dr. Lerner’s own invention—a newly minted ten percent standard.

80. According to Dr. Lerner, the large number of common advertisers may not be a “reliable” indication of competition because [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] common advertisers allocated “a material percentage of their ad

¹⁸⁶ Briceño Reply Decl. ¶ 8.

¹⁸⁷ Singer Decl. ¶ 45.

¹⁸⁸ *Tennis Channel MO&O*, 27 FCC Rcd. at 8527 ¶ 52.

¹⁸⁹ Comcast Answer to First Complaint ¶ 46.

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spend—more than 10 percent” to both the beIN and NBC networks.¹⁹⁰ But Dr. Lerner does not provide a citation to his *ad hoc* ten percent threshold; nor could he, as it lacks any grounding in economics.¹⁹¹ Rather, because of the large number of sports-related networks, Dr. Singer states that it would be surprising to find many advertisers that spend more than ten percent of their budgets on “both the beIN networks and to NBCSN and/or Universo,” or just three networks.¹⁹²

81. Additionally, Comcast cannot plausibly discount the shared advertisers mentioned in the complaint because some are large or advertise on other networks, too.¹⁹³ As explained in the Complaint, first of all, this does not account for the fact that advertisers target certain audiences with different advertisements, as the Commission has recognized.¹⁹⁴ A major car manufacturer would likely air an advertisement featuring a minivan and its conveniences on a network that targets families, but an advertisement touting its newest sports car on a network that targets a predominantly young male audience. [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] This is wrong; anyone who has watched the same company’s advertisements sees that they vary considerably when on different networks.

82. Comcast attempts to diminish the significance of one non-cookie-cutter advertising campaign by one larger advertiser—the [[BEGIN CONFIDENTIAL]]

¹⁹⁰ Lerner Suppl. Decl. ¶ 41.

¹⁹¹ Singer Decl. ¶ 39.

¹⁹² *Id.* (quoting Lerner Suppl. Decl. ¶ 41).

¹⁹³ Answer ¶ 36.

¹⁹⁴ *See GSN MO&O*, 32 FCC Rcd. at 6178-79 ¶ 60 (stating that advertisers use advertisements to target different audiences).

[[END CONFIDENTIAL]] As discussed below, Comcast would also add a requirement that the advertisers spend similar amounts on advertising on each network. Comcast has invented these requirements to ignore the obvious fact that the four networks share multiple advertisers who craft campaigns targeted at sports fans.

83. Larger common advertisers are not irrelevant to similarly situated status simply because they advertise on many networks. If the Commission were to hold that, it would also effectively disqualify advertisers as a means of demonstrating that networks are similarly situated. Under Dr. Lerner's theory, independent networks would also be punished for attracting large advertisers because it would be impossible for them to then demonstrate that they are similarly situated to any network that happens to also have the same large advertisers. This would lead to absurd results where obtaining large advertisers, which should be a salutary achievement for an independent network, would make it easier for a vertically integrated MVPD to discriminate against that independent network.

84. Comcast's reliance on *GSN* is likewise misplaced. That case was decided after lengthy discovery, a hearing, and an Administrative Law Judge decision.¹⁹⁶ A complainant at

¹⁹⁵ Lerner Suppl. Decl. ¶ 39.

¹⁹⁶ See *GSN MO&O*, 32 FCC Rcd. at 6163 ¶ 10.

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the *prima facie* stage need not be able to identify all common advertisers or provide in-depth economic analysis on their decisions. Rather, it is sufficient for a complainant to demonstrate, as beIN has done here, that the four networks have common advertisers and that beIN is a direct substitute for NBC Sports and Universo in the eyes of advertisers.¹⁹⁷

85. Most important, Comcast's criticism is wrong on the facts. The [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]]¹⁹⁸ advertisers buying airtime on both the beIN and the NBC networks include many small advertisers for whom the platforms of the NBC and beIN networks are uniquely suitable: [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

86. Comcast's argument about the advertising spend on other networks is irrelevant to this proceeding.²⁰⁰ The relevant factor is whether the four networks have overlapping advertisers, not whether the advertisers spend the most money on those four networks. In any event, Comcast is wrong. Comcast ignores the fact that beIN has in fact provided evidence [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]], demonstrating that it views spending between the two networks as substitutes. Comcast also tries to claim that, because [[BEGIN

¹⁹⁷ See *Tennis Channel HDO*, 25 FCC Rcd. at 14159 ¶ 17.

¹⁹⁸ Answer ¶ 36.

¹⁹⁹ CNBC aired Premier League games that were on the same times as ones shown on NBC and NBC Sports before Comcast moved those games to NBC Sports Gold, an online platform.

²⁰⁰ Answer ¶¶ 37-38.

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[[END

CONFIDENTIAL]] Comcast cites no precedent or support for this novel requirement.

87. Finally, Dr. Lerner’s analysis is wrong about the substitutability of advertisers. Dr. Lerner proposes an uninformative statistical test that purports to show a lack of substitution in advertising expenditures across the networks at issue by calculating the correlation between “the change in advertising spend on the beIN networks to the change in advertising spend on NBCSN and Universo.”²⁰² Dr. Lerner’s analysis fails to control for changes in pricing and thus, as a threshold matter, does not support its conclusion.²⁰³ Rather, Dr. Lerner produces a chart that undermines his thesis entirely: it shows [[BEGIN CONFIDENTIAL]]

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F. beIN Is Treated Better by Other MVPDs than under Comcast’s December 13, 2017 Offer.

88. Comcast claims that its treatment of beIN is akin to that of other distributors.²⁰⁵ Comcast makes much of AT&T’s decision to drop beIN after Comcast’s decision to drop beIN.²⁰⁶ Dr. Lerner, for example, muses that “the fact that AT&T/DIRECTV dropped the beIN networks at a similar time as Comcast likewise suggests that the beIN networks are of limited

²⁰¹ *Id.* ¶ 36 n.114.

²⁰² Lerner Suppl. Decl. ¶ 43.

²⁰³ Singer Decl. ¶ 38.

²⁰⁴ *Id.* ¶38.

²⁰⁵ Answer ¶ 39.

²⁰⁶ *Id.* ¶ 41.

value.”²⁰⁷ Comcast also makes much of Verizon’s and DISH’s decision not to increase beIN’s penetration.²⁰⁸

89. But Comcast’s analysis is flawed for two reasons. *First*, AT&T is vertically integrated, having acquired Time Warner, which holds the rights to soccer and other sports programming, in mid-2018.²⁰⁹ In terms of soccer programming, offerings from AT&T’s TNT network include the UEFA Champions League, UEFA Europa League, and the UEFA Super Cup. These tournaments involve the top teams from each of the various European leagues, including both La Liga and the EPL, competing head to head. And AT&T’s TBS and TNT telecast MLB and NBA games, respectively. While these AT&T programming rights do not prove AT&T’s action was motivated by beIN’s lack of affiliation, they do disqualify AT&T from serving as a proxy for how a non-vertically integrated distributor would treat beIN.²¹⁰ That vertically-integrated AT&T mimicked the conduct of also vertically-integrated Comcast does not demonstrate that Comcast’s conduct is non-discriminatory.²¹¹ When Comcast drops a network from its lineup, it relieves competitive pressure on in-region rival distributors to keep said network in their own lineups—just as one firm’s decision to raise its prices gives its competitors more leeway to do the same.²¹² Here, by removing two sports networks from its lineup, Comcast relieved competitive pressure on AT&T to continue offering beIN. That AT&T’s decision

²⁰⁷ Lerner Suppl. Decl. ¶ 52.

²⁰⁸ Answer ¶ 41.

²⁰⁹ Meyeringh Reply Decl. ¶ 8.

²¹⁰ Singer Decl. ¶ 31.

²¹¹ *Id.* ¶ 35.

²¹² *Id.*

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occurred a few days after Comcast dropped beIN suggests that AT&T's dropping of beIN was partially precipitated by Comcast's action and cannot be plausibly used to justify it.²¹³

90. *Second*, Dr. Singer explains that a better proxy would be how Comcast's non-vertically integrated rivals—that is, distributors that are not vertically integrated—carried beIN *before* Comcast dropped beIN.²¹⁴ On average, the non-conflicted distributors that carry beIN and beIN en Español do so to a higher percentage of their subscribers than Comcast does now, and as compared to beIN's penetration under the December 13, 2017 offer. [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] Under the original agreement, [[BEGIN CONFIDENTIAL]]

²¹³ Sklar Decl. ¶ 11; Singer Decl. ¶ 35; *see* Briceño Reply Decl. ¶ 24.

²¹⁴ Singer Decl. ¶ 32.

²¹⁵ Tolle Reply Decl. ¶¶ 4, 8.

²¹⁶ Singer Decl. ¶ 32.

²¹⁷ *Id.*

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91. Similar results are obtained when examining carriage of beIN *or* beIN en Español (as opposed to carriage of both). [[BEGIN CONFIDENTIAL]]

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92. While Dr. Lerner emphasizes that beIN was blacked out for nine days during carriage negotiations with Verizon, he ultimately admits that beIN and Verizon reached a carriage agreement.²²⁰ Because Verizon is not vertically integrated, but competes against Comcast in many of the same geographic markets, it serves as an important comparable. Verizon continues to give beIN a high level of penetration to its subscriber base, confirming beIN's value to Verizon.²²¹ This treatment by non-conflicted rivals is obviously superior to

²¹⁸ Singer Decl. ¶ 33.

²¹⁹ *Id.*

²²⁰ *Id.* ¶ 34.

²²¹ *Id.*

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Comcast’s decision to drop beIN entirely.²²² That DISH and Verizon held steady in their carriage of beIN undermines Comcast’s efficiency rationale to discard beIN and beIN en Español.²²³

93. Comcast’s attempt to lay blame at the doorstep of other distributors and to beIN (everyone but Comcast itself) also ignores Comcast’s immense power in dictating industry-wide carriage terms. It is well known in the industry that Comcast is the market maker, and that a distribution decision by Comcast makes it hard to achieve better distribution on other systems.²²⁴

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²²² *Id.*

²²³ *Id.*

²²⁴ Sahl Reply Decl. ¶ 13; *see Tennis Channel MO&O*, 27 FCC Rcd. at 8534-35 ¶ 73 (record illustrates that “MVPDs would often ‘inquire about Tennis Channel’s level of carriage on Comcast’ and would often follow Comcast’s lead”).

²²⁵ *See* Complaint, Exhibit 4 at ¶ 15 (beIN-Comcast Carriage Agreement).

²²⁶ *See* Promoting the Availability of Diverse and Independent Sources of Video Programming, *Notice of Proposed Rulemaking*, 31 FCC Rcd. 11352, 11353 ¶ 2 (2016) (“Because restrictive contract provisions limit the incentives and ability of independent programmers to experiment with innovative carriage terms and to license their content on alternative, innovative platforms, they deprive consumers of the benefits that otherwise would flow from enhanced competition in the video programming and distribution marketplace.”) (“*MFN NPRM*”).

²²⁷ *Id.* at 11363 ¶ 19 (“However, we are not persuaded based on the record that such justifications exist for MFN provisions that are unconditional and thus permit ‘cherry picking’ of the best contract terms. Because, as noted above, unconditional MFN provisions entitle an MVPD to the

[[END

CONFIDENTIAL]], it is a significant constraint on beIN's ability to obtain broader distribution from other distributors.²³⁰

94. Finally, and just as important, a finding of similarly situated status does not require the programmer to show that it is as powerful as the vertically integrated programmer or that it, too, can gain advantageous terms by tying the programming in question to other, must-have programming. This, of course, is exactly what NBC does in its negotiations with other distributors. NBC can demand broad carriage for NBC Sports and Universo by using retransmission consent for its all-important owned and operated NBC network stations as a hammer. Comcast has must-have programming, such as its NBC network, the Olympics, and the

most favorable terms granted to other distributors without obligating the MVPD to provide the same or equivalent consideration in exchange for those terms, such provisions appear designed to discourage or foreclose the wider distribution of video content, including on online platforms.”).

²²⁸ See 2012 Comcast and beIN Agreement, Section 15.1, attached as Exhibit 4 to Complaint.

²²⁹ Sahl Reply Decl. ¶ 14.

²³⁰ Briceño Reply Decl. ¶ 21.

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USA network.²³¹ For other MVPDs, even large ones, to obtain access to this programming, they must acquiesce to carrying the rest of NBC's programming.²³² This is a widespread phenomenon in the programming market, where just a handful of the largest programmers, including NBC, are able to force MVPDs to accept as many as 65 channels to acquire distribution rights to just a few must-have channels or programs.²³³

95. It is by wielding this power that NBC has achieved broad distribution not only for NBC Sports and Universo but also for such undeniably specialty-taste content as the SyFy channel.²³⁴ Indeed, economists have recognized that cable-affiliated networks are carried more broadly by other vertically integrated cable networks, potentially owing to implicit coordination

²³¹ See *Businesses*, NBC Universal, <http://www.nbcuniversal.com/who-we-are> (last visited May 5, 2019).

²³² Promoting the Availability of Diverse and Independent Sources of Video Programming, *Notice of Inquiry*, 31 FCC Rcd. 1610, 1616 ¶ 15 (2016) (“*Independent Sources NOI*”) (“In particular, [MVPDs] assert that [large media entities] often leverage their marquee programming (e.g., premium channels or regional sports programming) to force MVPDs to carry additional channels that have little or no consumer demand.”).

²³³ Sklar Decl. ¶ 9; see Comments of American Cable Association, MB Docket No. 16-41, 14-15 (Mar. 30, 2016) (“ACA Comments”).

²³⁴ Sklar Decl. ¶ 9; see *Independent Sources NOI*, 31 FCC Rcd. at 1616 ¶ 15 (“In particular, [MVPDs] assert that [large media entities] often leverage their marquee programming (e.g., premium channels or regional sports programming) to force MVPDs to carry additional channels that have little or no consumer demand.”); see also Daniel Frankel, *Comcast's Behavior in Wave Dispute is 'Outrageous,' ACA Says*, FierceVideo (Dec. 21, 2017), <https://www.fiercevideo.com/cable/comcast-s-behavior-wave-dispute-outrageous-aca-says> (noting that Comcast's forced bundling and penetration requirements harms competition and that NBCU fees accounted for 21% of one MVPD's package's costs); Chris Mills, *Comcast is Ruining Cheap Cable Bundles, Because Comcast*, BGR (Oct. 16, 2017), <http://bgr.com/2017/10/16/comcast-cheap-cable-bundle-lol-nope/> (“Comcast is forcing small cable companies to bundle NBC Sports into any cable package that reaches more than 15% of a customer's user base.”).

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via reciprocal carriage agreements.²³⁵ Thus, that other cable operators carry Comcast's affiliated programming in return for Comcast's carrying theirs is not indicative of the relevant value of NBCSN and Universo.

96. In a related vein, small MVPDs cannot afford to carry many independent networks, including because Comcast forces those MVPDs to acquire bundled programming packages.²³⁶ By being forced to carry expensive bundles, small MVPDs are less able to then pay for independent networks too. Small MVPDs also have a lack of bandwidth to carry independent programming, as the forced bundling takes up most of their capacity and forces them to drop independent programming.²³⁷ The American Cable Association has also demonstrated that even when a small MVPD has available bandwidth, it often must reserve that bandwidth as large programming syndicates will often demand that the MVPDs carry new spin-off channels, such as college-conference-specific Regional Sports Networks.²³⁸

VI. COMCAST'S OFFER WAS NOT JUSTIFIED BY LEGITIMATE COMMERCIAL CONSIDERATIONS

A. Comcast Attempts to Impose a Higher Standard than beIN Must Meet at the *Prima Facie* Stage.

97. Comcast should not be heard to charge beIN with not proving that Comcast had discriminatory intent.²³⁹ Without the benefit of discovery, and barring a defendant naive enough to be videotaped admitting discriminatory intent in public, a complainant lacks the wherewithal

²³⁵ Singer Decl. ¶ 44.

²³⁶ ACA Comments at 13-14.

²³⁷ *Id.* at 18-19.

²³⁸ *Id.* at 24-25.

²³⁹ Answer ¶ 46.

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to offer such proof at this stage. The Commission has deferred the question of commercial considerations to the merit stage for yet another good, policy reason: if a defendant could get away with hiding its discrimination behind a fig leaf of legitimate commercial considerations without allowing the testing of such claims through the adversarial process, program carriage grievances would essentially be reduced to a *pro forma* process of complaint denial. This is why the complainant can satisfy the *prima facie* discrimination basis showing not only by the rare occurrence of direct evidence, “such as statements showing a discriminatory intent, [but also] by circumstantial evidence, such as uneven treatment of similarly situated entities.”²⁴⁰

B. Comcast’s Discriminatory Offer Was Not Justified by Legitimate Commercial Considerations.

98. Comcast and Dr. Lerner argue that Comcast obtained a net cost savings by removing beIN and beIN en Español, and thus Comcast cannot be discriminating against beIN on the basis of affiliation.²⁴¹ This contention is wrong. As Dr. Singer explains, the D.C. Circuit’s “net benefit” test,²⁴² adopted in the *Tennis Channel* case, is inapposite here.²⁴³ Additionally, even if it were applicable, Comcast misapplied that test; its analysis suffers from deficiencies, such as ignoring substantial costs and losses that resulted from its removal of beIN and beIN en Español, which render it inaccurate and untrustworthy.²⁴⁴

²⁴⁰ Herring Broadcasting, Inc., D/B/A WealthTV, Complainant v. Time Warner Cable Inc., et al., Defendants, *Recommended Decision of Chief Administrative Law Judge Richard L. Sippel*, 24 FCC Rcd. 12967, 12997-98 ¶ 63 (2009).

²⁴¹ Answer ¶¶ 4-5, 53.

²⁴² *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 987 (D.C. Cir. 2013).

²⁴³ Singer Decl. ¶ 14.

²⁴⁴ *Id.* ¶¶ 19-28.

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99. The idea that Comcast made the December 13, 2017 offer because broader distribution of beIN’s network would not yield a “net benefit” for Comcast or would lose Comcast money cannot survive a simple fact—the [[BEGIN CONFIDENTIAL]]

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100. This is true despite the possibility of a shrinking customer base. While a shrinking base would translate into an increased fee on a per subscriber basis, Comcast suffered a loss of just 0.43% from Q1 2017 to Q1 2018.²⁴⁷ Such attrition does not even begin to offset the huge decrease in per subscriber fees resulting from moving beIN from a package with [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]. Comcast is also protected from the prospect of a declining subscriber base by the [[BEGIN CONFIDENTIAL]]

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²⁴⁵ Complaint ¶ 49.

²⁴⁶ Singer Decl. ¶ 16.

²⁴⁷ See Press Release, *Major Pay-TV Providers Lost about 305,000 Subscribers in 1Q 2018*, Leichtman Research Group (May 17, 2018), <https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-305000-subscribers-in-1q-2018/>.

²⁴⁸ Complaint ¶ 50.

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101. Because it cannot meet the net benefit test as articulated by the D.C. Circuit in the *Tennis Channel* matter, Comcast tries to change the test, and instead makes a strawman showing—that *any* carriage of beIN on Comcast’s part yields no benefit for Comcast and is essentially an act of philanthropy. But Comcast and its experts have failed to show that the conduct at issue would make economic sense absent Comcast’s incentives to steer viewers away from beIN and beIN en Español and toward its own, similarly situated networks.

102. First of all, Comcast received value from carrying beIN on its Sports and Entertainment Tier and Latino Tier to [[BEGIN CONFIDENTIAL]]

²⁴⁹ Singer Decl. ¶ 18; Briceño Reply Decl. ¶ 6.

²⁵⁰ Singer Decl. ¶ 18; Briceño Reply Decl. ¶ 6.

²⁵¹ Singer Decl. ¶ 18; Briceño Reply Decl. ¶ 6.

²⁵² Singer Decl. ¶ 18; Briceño Reply Decl. ¶ 6.

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103. While Comcast claims that “very few customers were watching the beIN networks regularly,”²⁵⁴ and that “beIN insisted on unrealistic terms that were out of step with the marketplace and bore no relationship to the actual value of the beIN networks to Comcast and its customers,”²⁵⁵ these claims are directly belied by [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Comcast’s claims are also belied by Comcast’s avid promotion of the Spanish and French leagues. Saying “soccer” into the X1 remote elicits a boast that these leagues are available on Sling.²⁵⁷ Specifically, as discussed by Mr. Briceño, X1 subscribers are shown an icon for Sling’s World Sports package, which states “Get La Liga and more.”²⁵⁸ La Liga is listed as one of four “Top Leagues,” and two of the four leagues that an X1 subscriber can click on for “Tables & Standings” information are leagues for which beIN holds the rights (La Liga and Ligue 1). Additionally, two of the three players pictured on the “Top

²⁵³ Singer Decl. ¶ 18; Briceño Reply Decl. ¶ 6.

²⁵⁴ Answer ¶ 4.

²⁵⁵ *Id.* ¶ 47.

²⁵⁶ *Id.* ¶ 52 n.149.

²⁵⁷ Briceño Reply Decl. ¶ 7.

²⁵⁸ *Id.*

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Teams” icon play in leagues carried by beIN (Lionel Messi, who plays for Barcelona of La Liga, and Kylian Mbappé, who plays for Paris St. Germain of Ligue 1). Comcast values beIN’s content, it just wants to take beIN out of the business of providing it.

104. In any event, Comcast and its experts have failed to demonstrate a net loss to Comcast’s downstream division from broader carriage as an empirical matter.²⁵⁹ Dr. Lerner’s implementation of the net benefit test does not entail any original analysis of his own. He simply accepts estimates submitted by a Comcast executive, Mr. Brayford, who in turn relies on an undisclosed analysis by Enterprise Business Intelligence (“EBI”).²⁶⁰ Mr. Litman does the same.²⁶¹ Dr. Lerner’s willingness to opine on the net benefit test under these circumstances is inconsistent with standard economic practice.²⁶²

105. Indeed, while the details of Comcast’s net benefit test have not been made available, Dr. Singer notes that certain deficiencies are obvious from the available descriptions. Comcast’s experts ignore predictable downstream losses for Comcast. Most obviously, by focusing narrowly on “cord cutting”—those customers that left Comcast altogether as a result of the dropping of beIN—Mr. Brayford failed to tally “cord shaving” losses from canceled Sports and Entertainment tier and Latino subscriptions.²⁶³ Further, while Mr. Litman opines that removing beIN en Español from the Sports and Entertainment and Latino tiers would “compromise the revenue [Comcast] earned from the sale of [Sports and Entertainment or

²⁵⁹ Singer Decl. ¶ 19.

²⁶⁰ Lerner Suppl. Decl. ¶¶ 50-51; Brayford Declaration ¶¶ 48-51.

²⁶¹ Declaration of Peter Litman ¶ 77 (May 11, 2018), included as Attachment A to Litman Suppl. Decl. (“Litman Decl.”).

²⁶² Singer Decl. ¶ 14.

²⁶³ *Id.* ¶ 20.

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Latino] tiers for which beIN Sports en Español was a significant draw,”²⁶⁴ he failed to even estimate the lift in viewership to Comcast’s affiliated networks attributable to the removal of beIN from its system.²⁶⁵

106. Even setting aside lost Sports and Entertainment or Latino tier customers, Comcast potentially understates churn from Comcast’s Basic tier attributable to the dropping of beIN.²⁶⁶ {{BEGIN HCI}}

{{END HCI}} A proper

analysis of the economic benefits of broader distribution would also have to assume, as an initial matter, broader distribution of beIN and then estimate what the churn would be from subsequent discontinuance of beIN when many more Comcast customers have been exposed to its

²⁶⁴ Litman Suppl. Decl. ¶ 50.

²⁶⁵ Singer Decl. ¶ 28.

²⁶⁶ *Id.* ¶ 22.

²⁶⁷ Brayford Declaration ¶ 49.

²⁶⁸ Singer Decl. ¶ 22.

²⁶⁹ *Id.*

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programming.²⁷⁰ That Comcast purportedly experienced little churn on the basic tier when it removed beIN from the Sports and Entertainment and Latino tiers may not serve as a good predictor of the basic-tier churn Comcast would have experienced had it removed beIN from Comcast's basic tier.²⁷¹

107. Comcast's answer also {{BEGIN HCI}}

{{END HCI}}

108. Comcast also cannot rely on expectations that downstream defections would have been limited due to the likelihood that other distributors would follow suit.²⁷⁵ When beIN becomes unavailable on competing distributors, this decreases the likelihood that a beIN loyalist will defect from Comcast to another distributor.²⁷⁶ By this logic, any form of discrimination by

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Brayford Decl. ¶ 51.

²⁷³ Singer Decl. ¶ 23.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* ¶ 25.

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Comcast could pass the net benefit test, provided that the independent network disappears from a sufficient number of competing distributors as a result of Comcast's discrimination.²⁷⁷

109. Comcast's experts also ignore mitigation costs—that is, any costs that Comcast incurred to prevent dissatisfied subscribers from dropping the Sports and Entertainment or Latino tiers, or from dropping Comcast altogether.²⁷⁸ These costs can include payments or expenditures of “save desk” and other resources to compensate or appease disgruntled customers for their inability to watch a canceled network and dissuade them from churning.²⁷⁹ While Mr. Brayford mentions customer complaint calls in the “low thousands”²⁸⁰ in the aftermath of its decision to drop beIN, he provides no indication as to whether Comcast incentivized any portion of those customers not to leave.²⁸¹ This contention also conflicts with the fact that beIN's website dedicated to informing customers about beIN's dispute with Comcast has received 2.4 million visitors since beIN was dropped by Comcast.²⁸² Dr. Singer understands, based on his prior experience implementing the net benefit test, that mitigation costs are not just economically significant, but pivotal factors.²⁸³

110. Comcast's argument that it cannot move beIN to a higher penetration tier without raising rates on its customers also falls apart in the face of Comcast's actual practices. As recently as last year, Comcast increased its fees for its XFINITY packages without adding

²⁷⁷ *Id.*

²⁷⁸ *Id.* ¶ 21.

²⁷⁹ *Id.*

²⁸⁰ Brayford Decl. ¶ 48.

²⁸¹ Singer Decl. ¶ 21.

²⁸² Meyeringh Reply Decl. ¶ 10.

²⁸³ Singer Decl. ¶ 21.

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channels,²⁸⁴ and also raised the additional “Broadcast TV” and “Regional Sports Network” fees it charges.²⁸⁵ Comcast already has been increasing its rates with frequency and apparent insouciance. This is not surprising. It reflects the inelasticity of demand that is due to the high switching costs faced by Comcast subscribers and impeding moves to competing distributors, especially the inconvenience or impossibility of leaving a triple play (broadband, phone and video) package and finding not only an alternative video provider but also a broadband provider as well.

111. Additionally, Comcast fails to provide any evidence to support the dubious proposition that Comcast consistently imposes the same net benefit test on its own affiliated networks.²⁸⁶ To be economically meaningful, Comcast’s application of the test should demonstrate that Comcast consistently retains networks that—according to calculations comparable to Mr. Brayford’s here—generate profits for its downstream division, while consistently discarding networks that do not.²⁸⁷ Comcast provides no evidence that Mr. Brayford’s analysis has been applied to any network on Comcast’s system other than beIN;²⁸⁸ thus, discovery regarding if, and the extent to which, Comcast applies the net benefit test to

²⁸⁴ Briceño Reply Decl. ¶ 37; Paul Resnikoff, *Comcast Substantially Increases 2018 Rates, Says Customers ‘Getting More for Their Money,’* Digital Music News (Jan. 3, 2018), <https://www.digitalmusicnews.com/2018/01/03/comcast-increases-2018/>.

²⁸⁵ Briceño Reply Decl. ¶ 37; Jon Brodtkin, *Comcast Raises Cable TV Bills Again—Even If You’re Under Contract*, Ars Technica (Nov. 26, 2018), <https://arstechnica.com/tech-policy/2018/11/comcasts-controversial-tv-and-sports-fees-rise-again-hit-18-25-a-month/>.

²⁸⁶ Singer Decl. ¶ 29.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

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affiliate networks is warranted. If it does not, then such conduct would be consistent with discrimination on the basis of affiliation.²⁸⁹

112. Comcast also seeks to hide its discriminatory conduct by claiming that the
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²⁸⁹ *Id.*

²⁹⁰ Answer ¶ 47.

²⁹¹ Meyeringh Decl. ¶ 11.

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113. Furthermore, Comcast barely acknowledges [[BEGIN CONFIDENTIAL]]

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²⁹² Answer ¶ 47.

²⁹³ See SNL Kagan Profile for NBC Sports, attached as Exhibit 8.

²⁹⁴ See SNL Kagan Profile for Universo, attached as Exhibit 9.

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114. Comcast engages in logical acrobatics when it argues that, if passionate beIN fans have already left Comcast's Sports and Entertainment package to get beIN more cheaply elsewhere, the carriage of beIN on Comcast's Digital Starter tier would be of no benefit to Comcast. To begin with, this is a variant of the argument that historical discrimination justifies future discrimination—an argument that the Commission has rejected.²⁹⁵ But in fact, the benefit to Comcast exists and is concrete: if Comcast includes beIN in the [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] package, beIN fans who left because the cheapest way of receiving both beIN networks on Comcast was by paying \$59.98²⁹⁶ a month, would now be able to receive beIN on the [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] and thus may be lured back to Comcast. And future beIN fans would be attracted to Comcast in the first place. On the other side of the ledger, the loss of Sports and Entertainment package subscriptions from the move of beIN to a broader distribution would be modest under Comcast's own analysis.

115. Comcast cannot rely on beIN being available on its X1 platform through the Sling TV app to justify its actions. First, beIN is not available at all to those Comcast customers who are not on the X1 platform. Second, the OTT video feed of beIN available through Sling's \$10 World Sports package on the Xfinity platform is not a substitute for delivery of beIN via Comcast's linear cable system.²⁹⁷ The 1992 Cable Act is specifically concerned with

²⁹⁵ *NFL HDO*, 23 FCC Rcd. at 14825-27 ¶¶ 79, 81, 84 (rejecting Comcast's argument that differences in distribution of affiliated networks arising from historic treatment of the same were legitimate business justifications for disparate carriage decisions).

²⁹⁶ Litman Decl. ¶ 108.

²⁹⁷ Briceño Reply Decl. ¶ 31.

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discrimination relating to carriage on a cable system's linear platform.²⁹⁸ The availability of beIN through means other than Comcast's cable system thus cannot excuse discrimination as to carriage on its cable system. Just as important, the use of Sling on the X1 box will count against the data cap imposed by Comcast, another incurred cost that Comcast ignores.²⁹⁹

116. Further, in arguing that its Sports and Entertainment and basic Latino add-on packages cost approximately the same price as Sling's World Sports package,³⁰⁰ Comcast ignores the substantial programming differences between its Sports and Entertainment³⁰¹ and Latino packages,³⁰² and Sling's World Sports package.³⁰³ Indeed, none of the 17 different networks available on the Sports and Entertainment package, nor any of the 31 to 81 networks offered on Comcast's various Latino packages, overlaps with the limited networks available on

²⁹⁸ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460, 1460-61 (1992) (finding that vertical integration in the cable industry "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems") ("1992 Cable Act"); 47 U.S.C. § 521(5).

²⁹⁹ *Sling International and Sling World Sports on X1 FAQs*, Comcast, <https://www.xfinity.com/support/articles/sling-international-on-x1-faqs> (last visited May 5, 2019) ("Sling International and Sling World Sports programming is delivered over your Xfinity Internet service to your X1 TV Box and is therefore subject to the rules, terms and conditions that govern Xfinity Internet service, including any data usage plans that may apply.").

³⁰⁰ Answer ¶ 3.

³⁰¹ Comcast's Sports and Entertainment package includes: CBS Sports Network (SD and HD); Crime & Investigation Network; CMT; ESPN Classic; ESPN News (HD and SD); ESPNU (SD and HD); Military History Channel; MLB Network (HD and SD); Fox Sports Regional Networks; The Sportsman Channel; NBA TV (HD and SD); NFL Network (HD and SD); NHL Network; Outdoor Channel (HD and SD); Pac-12 Network; Tennis Channel (HD and SD); and World Fishing Network (HD and SD). Briceño Reply Decl. ¶ 33.

³⁰² Comcast offers four versions of its add-on Latino package. The smallest package—Basic Latino—includes SD and HD feeds for 31 different networks. The largest package—Starter Latino—includes SD and HD feeds for 81 different networks. Briceño Reply Decl. ¶ 34.

³⁰³ Sling's World Sports package includes: beIN, beIN en Español, beIN SPORTS Connect, Nautical Channel, Outside Television, TRACE Sport Stars, Willow Cricket, and Willow Extra. Briceño Reply Decl. ¶ 35.

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Sling’s World Sports package. Thus, a Comcast customer that wants both beIN and one or more networks on the Sports and Entertainment must incur costs of approximately \$20 per month to obtain both channels—\$10 for the World Sports package³⁰⁴ and another \$9.95 for Comcast’s Sports and Entertainment package³⁰⁵—as opposed to the \$9.95 per month cost incurred prior to August 1, 2018. Comcast ignores these costs in its analysis.

117. Comcast should also be estopped from invoking its sharp-elbowed effort to secure beIN’s content without paying a penny to beIN as evidence that it is doing nothing wrong.

118. The idea that commercial benefit to itself is Comcast’s exclusive lodestar, and Comcast is treating beIN worse than its affiliates because it derives no benefit from beIN, explodes in the face of [[BEGIN CONFIDENTIAL]]

³⁰⁴ Answer ¶ 3.

³⁰⁵ *Add-On Channels*, Comcast, <https://www.xfinity.com/learn/digital-cable-tv/sports> (last visited May 5, 2019).

³⁰⁶ [[BEGIN CONFIDENTIAL]]

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³⁰⁷ Tolle Reply Decl. ¶ 6.

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VII. beIN HAS DEMONSTRATED THAT COMCAST'S DISCRIMINATORY ACTIONS UNREASONABLY RESTRAINED IT FROM COMPETING

A. The Comcast/NBCU Condition Applies.

119. Comcast is wrong that its offer is not subject to the program carriage condition that accompanied Comcast's acquisition of NBC.³⁰⁹ That offer was made on December 13, 2017, while that condition is still in force. What matters under the condition is the time of the conduct in question, not the date of the complaint. Certainly the Commission did not require allegations of violations of this behavior to be brought to it by the time of the expiration of these conditions. Had the Commission intended such a requirement, it would have said so. Rather, the only time limit on bringing a complaint about such behavior is the statute of limitations. Nor is the absence of such an additional limit surprising. If complaints alleging violations of a condition had to be filed before January 20, 2018, then as a practical matter conduct occurring in the last few months of 2017, or even January 19, 2018, would not be reached by the condition, as it would be difficult or impossible to file a complaint alleging such conduct by the condition's expiration date. Such a reading of the condition's term would artificially shorten the life of the condition by many months, and should be rejected.

³⁰⁸ *Id.* ¶ 7.

³⁰⁹ Answer ¶ 60.

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120. Comcast’s reliance on Commission precedent is misplaced.³¹⁰ In both *News Corp.* and *The America Channel*, the Commission suspended or revoked the relevant condition because the facts necessitating the condition no longer existed.³¹¹ Because the Commission did so, it felt it necessary to place a particular limit on when further complaints could be filed. This is not the case here, where the opportunity for Comcast to discriminate in favor of affiliated programming has not disappeared (Comcast remains vertically integrated).

B. Comcast Has Unreasonably Restrained beIN’s Ability to Compete.

121. Comcast’s December 13 offer unreasonably restrained beIN’s ability to compete. The Commission has held that the failure to carry unaffiliated networks at the same level as affiliated networks unreasonably restrains the former networks’ ability to compete because it deprives them of licensing fees that “could be used to improve the network.”³¹² [[BEGIN CONFIDENTIAL]]

³¹⁰ *Id.* (averring that “[t]he Commission has made clear that party-initiated program access and carriage remedies, including complaint-based and arbitration remedies, must be *formally invoked or initiated* prior to the expiration of the condition”) (emphasis in original).

³¹¹ General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, *Memorandum Opinion and Order*, 24 FCC Rcd. 8674, 8679 ¶ 10 (2009); Comcast Corporation Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network, *Order*, 22 FCC Rcd. 17938, 17946 ¶ 24 (2007).

³¹² *Tennis Channel HDO*, 25 FCC Rcd. at 14161 ¶ 20 (“The Tennis Channel has put forth evidence sufficient to demonstrate for the purpose of establishing a *prima facie* case of program carriage discrimination that Comcast’s unwillingness to distribute the network more broadly and its disparate treatment of the network has unreasonably restrained The Tennis Channel’s ability to compete fairly. The Tennis Channel claims that Comcast’s failure to carry the network at the same level offered to Versus and the Golf Channel has impaired the network’s overall distribution and subscription fee revenue, thereby depriving The Tennis Channel of license fees that can be used to improve the network.”).

³¹³ Briceño Reply Decl. ¶ 27; Singer Decl. ¶ 49.

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[[END CONFIDENTIAL]] For these reasons, the Commission has found that placement on a premier sports tier can impair a network's ability to compete.³¹⁵ This is precisely where Comcast's December 13 offer would have relegated beIN.

122. beIN has already started suffering many of these harms. [[BEGIN
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³¹⁴ Briceño Reply Decl. ¶ 27.

³¹⁵ Game Show Network, LLC, Defendant v. Cablevision Systems Corp., Defendant, *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 27 FCC Rcd. 5113, 5134 ¶ 33 (2012).

³¹⁶ Singer Decl. ¶ 49.

³¹⁷ Briceño Reply Decl. ¶ 24.

³¹⁸ *Id.* ¶ 25.

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123. [[BEGIN CONFIDENTIAL]]

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124. [[BEGIN CONFIDENTIAL]]

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125. [[BEGIN CONFIDENTIAL]]

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126. These harms do not flow from beIN’s “own poor business decisions and strategy,” as alleged by Comcast.³²³ Rather, they are a direct consequence of Comcast’s discriminatory behavior. Comcast tries to claim that these results “follow[ed] the parties’

³¹⁹ *Id.* ¶ 27.

³²⁰ *Id.* ¶ 28.

³²¹ *Id.* ¶ 29.

³²² *Id.* ¶ 30.

³²³ Answer ¶ 64; Briceño Reply Decl. ¶ 31.

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impasse” and “are entirely unrelated to Comcast’s December 2017 Offer.”³²⁴ It is inappropriate for Comcast to discriminate against beIN, drop it from its packages, and then turn around and claim that all of the foreseeable effects of its discriminatory behavior are somehow beIN’s fault. The program carriage rules exist to protect independent video programming vendors from being faced with a choice between accepting a discriminatory offer or being dropped by an MVPD. beIN should not be forced to accept a discriminatory offer or face the potentially ruinous effects of a blackout. And, as discussed, beIN’s availability through Internet-based platforms such as SlingTV does not compensate for this impairment.³²⁵

127. Additionally, Mr. Litman’s claim that growth in beIN subs outside of Comcast (the “foreclosed” segment) proves that beIN was not unreasonably restrained from competing by the conduct is uneconomic.³²⁶ The relevant question is what beIN’s growth outside the foreclosed segment *would have been absent the challenged conduct*.³²⁷ And even if the conduct had no effect on beIN’s growth in the non-foreclosed segment, the fact that beIN is growing there actually suggests that other distributors highly value beIN’s programming, thereby undermining Comcast’s efficiency defense.³²⁸ In any event, Comcast’s footprint of nearly one quarter of all MVPD video subscribers is sufficiently large that it alone can deny beIN critical

³²⁴ Answer ¶ 63.

³²⁵ Singer Decl. ¶ 50; Briceño Reply Decl. ¶ 31.

³²⁶ Litman Suppl. Decl. ¶ 7; Singer ¶ 51.

³²⁷ Singer ¶ 51.

³²⁸ *Id.*

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economies of scale; one may not be able to see this kind of impairment in short-term subscriber trends.³²⁹

128. Finally, Comcast should not be heard to claim that the market is too competitive for its discriminatory offer to unreasonably restrain beIN from competing fairly.³³⁰ Comcast's argument would essentially mean that no programmer could ever bring a carriage complaint, as the marketplace would be too competitive for any one MVPD, including the largest cable operator, to unreasonably restrain a programmer from competing. Comcast is, once again, effectively asking the Commission to overturn its program carriage regulations and the statutory command of Congress.

VIII. beIN IS NOT PRECLUDED FROM BRINGING ANY OF THE CLAIMS IN THE DECEMBER 13 COMPLAINT

129. Comcast contends that, when the Bureau dismissed beIN's complaint without prejudice, it effectively dismissed it with prejudice, precluding the filing of the Complaint. But this argument leaves Comcast unable to explain what "without prejudice" means. By dismissing beIN's original complaint "without prejudice," the Bureau intended to allow beIN to refile the claims made in that complaint and to address the deficiencies discussed in the *Dismissal Order*. The Commission dismisses complaints "without prejudice" when it intends to allow the complainant to refile.³³¹ Indeed, the Commission views the alternatives of "dismissing without

³²⁹ *Id.*

³³⁰ Answer ¶ 65.

³³¹ *Nina Shahin, Complainant v. Verizon, Respondent*, 28 FCC Rcd. 122, 122 ¶ 1 (2013) ("Because [the order] dismissed Shahin's Complaint without prejudice, she is free to refile . . .").

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prejudice or asking the complainant to supplement the record... as functional alternatives.”³³²

Comcast does not, because it cannot, point to any language in the *Dismissal Order* suggesting that, despite dismissing “without prejudice,” the *Dismissal Order* prevents beIN from refiling. Comcast fails to explain why the Bureau chose to dismiss the December 13 complaint without prejudice if its intended result was that beIN could not refile.

130. While Comcast explains that the *Dismissal Order* did not prejudice beIN’s right to bring another complaint based on “different facts or evidence,”³³³ the distinction between different evidence and new evidence does not even make sense, and is unavailing in any event. “Without prejudice” cannot mean that beIN would be hypothetically able to refile its claim only in a parallel world of “different” facts. If the Bureau had decided that the claim needed “different” facts to sustain it, it would have dismissed the complaint with prejudice. Contrary to Comcast’s claim, the Liberman case is not distinguishable:³³⁴ just as the Bureau’s dismissal left Liberman free to plead new facts and new evidence showing that it has standing, this dismissal left beIN free to show that it had in fact supplied Comcast with sufficient evidence and certainty about its content rights.

131. The *Dismissal Order* also does not resolve the December 13 complaint’s claims in a “sufficiently firm way.”³³⁵ The Bureau dismissed the December 13 on limited grounds: beIN did not present a sufficient degree of certainty about the programming it would feature to allow

³³² Verizon Florida LLC v. Florida Power and Light Co., *Memorandum Opinion and Order*, 30 FCC Rcd. 1140, 1150 ¶ 25 n.88 (2015).

³³³ Answer ¶ 13.

³³⁴ *Id.* ¶ 13 n.21.

³³⁵ *Id.* ¶ 11.

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the Bureau to determine whether beIN would going forward provide programming that is “similarly situated” to that of NBC Sports and Universo.³³⁶ The same uncertainty led the Bureau to find that beIN had failed to provide evidence sufficient to support its claim that Comcast had discriminated against it and in favor of NBC Sports and Universo. This is not language precluding beIN from ever providing sufficient evidence, leaving open the option for beIN to refile the complaint with evidence sufficient to establish a *prima facie* case. Nor is it a finding that there was a definitive lack of programming certainty, that the programming in question was not similarly situated, or that Comcast had not discriminated against beIN in violation of Section 616.

132. Because of the narrow grounds of the dismissal, the Bureau cannot be considered to have fully heard beIN’s case or determine an issue raised, as is required for collateral estoppel to apply. This interpretation is consistent with the D.C. District Court’s decision in *Brewer v. District of Columbia*. There, the court concluded that “the plaintiff’s claims here are not barred because the prior action was dismissed without prejudice and consequently no issues of fact or law had been decided.”³³⁷ Likewise, in *Ponder v. Chase Home Finance, LLC*, the same court found that it is “beyond dispute that a dismissal without prejudice does not determine the merits.”³³⁸

133. Similarly, the Bureau’s dismissal is analogous to the dismissal of Verizon’s complaint in *Verizon Florida*. There, the Enforcement Bureau “dismiss[ed] without prejudice to

³³⁶ *Dismissal Order*, 33 FCC Rcd. at 7480 ¶ 14.

³³⁷ *Brewer v. District of Columbia*, 891 F.Supp. 2d 126, 134 (D.D.C. 2012).

³³⁸ *Ponder v. Chase Home Finance, LLC*, 865 F.Supp. 2d 13, 17 (D.D.C. 2012) (quoting *Interdonato v. Interdonato*, 521 A.2d 1124, 1131 n. 11 (D.C. 1987)).

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allow Verizon the option of refiling its complaint with additional evidentiary support.”³³⁹

Similar to beIN’s December 13 complaint, Verizon’s complaint was dismissed because Verizon had not, among things, demonstrated that it was “similarly situated” to competitive local exchange carriers.

134. Additionally, Comcast’s confusing claim that beIN is judicially estopped from attempting to assert a different position regarding Serie A than it did in the March 2018 complaint fails in light of these authorities. beIN is not asserting an inconsistent position.

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[[END CONFIDENTIAL]] Thus, beIN carried

Serie A at the time of that complaint; it does not carry it now. As Comcast recognizes, beIN clearly represented to Comcast in negotiations that the renewal of Serie A was a big question mark.³⁴¹

IX. COMCAST’S SUBSEQUENT AUTHENTICATION, HIGH DEFINITION, AND DIRECT-TO-CONSUMER OFFERING TERMS DID NOT ALTER COMCAST’S DECEMBER 13 OFFER IN ANY MATERIAL WAY

135. Comcast believes that beIN is wrong in arguing that [[BEGIN
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³³⁹ *Verizon Florida LLC*, 30 FCC Rcd. at 1140 ¶ 1.

³⁴⁰ Briceño Reply Decl. ¶ 20.

³⁴¹ Answer ¶ 14.

³⁴² *Id.* ¶ 56.

[[END CONFIDENTIAL]]

136. [[BEGIN CONFIDENTIAL]]

³⁴³ *Id.* ¶ 56 n.156.

³⁴⁴ Tolle Reply Decl. ¶ 4.

³⁴⁵ *Id.*

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X. CONCLUSION

139. For the reasons set forth above, the Media Bureau should grant the relief sought in beIN's complaint, or alternatively, rule that beIN has made a *prima facie* case and designate the complaint for a hearing.

Respectfully submitted,

/s/

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(202) 429-3000
Counsel to beIN Sports, LLC

May 6, 2019

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CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on May 6, 2019, I caused true and correct copies of the foregoing beIN Reply to Answer, as well as a copy of the redacted version electronically filed with the Federal Communications Commission this day, to be served by overnight mail (Highly Confidential Version) and electronic mail (Confidential Version and Public Version) on the following:

Michael D. Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006-1238
Counsel to Comcast Corp.

/s/
Matthew R. Friedman

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VERIFICATION OF ANTONIO BRICEÑO

I, Antonio Briceño, have read the beIN's Reply in this matter, and state that, to the best of my knowledge, information, and belief formed after reasonable inquiry, the Reply is well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law. The Reply is not interposed for any improper purpose.

A handwritten signature in black ink, appearing to read 'Antonio Briceño', is written over a horizontal line.

Antonio Briceño
Deputy Managing Director,
US & Canada
beIN Sports, LLC

Dated: May 6, 2019

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EXHIBIT 1

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	File No. CSR-8972-P
)	
v.)	
)	
COMCAST CABLE COMMUNICATIONS,)	
LLC,)	
And)	
COMCAST CORPORATION,)	
Defendants.)	
)	
)	
TO: Chief, Media Bureau)	

REPLY DECLARATION OF ANTONIO BRICEÑO

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I, Antonio Briceño, being over 18 years of age, swear and affirm as follows:

1. I make this declaration using facts of which I have personal knowledge or based on information provided to me, in connection with the program carriage complaint of beIN Sports, LLC (“beIN”) against Comcast Cable Communications, LLC (“Comcast”) and the effects of Comcast’s program carriage offer on beIN.

2. I filed an initial declaration in this matter on December 13, 2018, which was included as Exhibit 8 to beIN’s complaint. My qualifications are discussed in that declaration.

3. I prepared and delivered beIN’s offers to Comcast and participated in, or supported, negotiations between beIN and Comcast.

4. ***Carriage of beIN and beIN en Español.*** Charter, DISH, Altice, and Cox all carry beIN and beIN en Español on general entertainment tiers, often in addition to their carriage on specialty tiers. Two major MVPDs (FiOS and CenturyLink) place beIN in more widely distributed packages, and one OVD (FuboTV) places beIN in its most widely distributed package bar none.¹ Others place beIN in packages that ensure greater penetration of their subscriber bases than Comcast’s Sports Entertainment package and XFINITY Latino packages.²

5. ***beIN’s value to Comcast.*** Comcast received value from carrying beIN on its Sports and Entertainment Tier and Latino Tier to [[BEGIN CONFIDENTIAL]]

¹ See Answer ¶ 41 and subsequent chart.

² See *id.*

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[[END CONFIDENTIAL]]

6. [[BEGIN CONFIDENTIAL]]

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7. Comcast avidly promotes the Spanish La Liga and French Ligue 1. Saying “soccer” into the X1 remote elicits a boast that these leagues are available on Sling, even as

³ Declaration of Hal Singer ¶ 18, attached as Exhibit 5 (“Singer Decl.”).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

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Comcast does not mention beIN and does not pay beIN a penny.⁷ Specifically, X1 subscribers are shown an icon for Sling’s World Sports package, which states “Get La Liga and more.” La Liga is listed as one of four “Top Leagues,” and two of the four leagues that an X1 subscriber can click on for “Tables & Standings” information are leagues for which beIN holds the rights (La Liga and Ligue 1). Additionally, two of the three players pictured on the “Top Teams” icon play in leagues carried by beIN (Lionel Messi, who plays for Barcelona of La Liga, and Kylian Mbappé, who plays for Paris St. Germain of Ligue 1). Comcast values beIN’s content, it just wants to take beIN out of the business of providing it.

8. *beIN’s networks and programming are in the same genre as NBC Sports and Universo.* I have extensive experience in the video programming industry. It is obvious to me that the beIN networks and programming are in the same genre as NBC Sports and Universo. All of beIN, beIN en Español, NBC Sports and Universo promote sports, and particularly soccer, as marquee programming to viewers and advertisers alike. The soccer brand projected by NBC Sports and Universo has only become more pronounced over the last few years; NBC Sports and Universo rely to a significant, and even increasing, extent on soccer programming. Recent Nielsen ratings show that the amount of soccer shown on NBC Sports is increasing, while Universo is staying the same. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Unlike “relationships,” “which is a common theme across

⁷ A screenshot taken after speaking “soccer” into a Comcast X1 remote is attached as Appendix A.

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many genres . . . rather than a genre itself,”⁸ soccer is a concrete and specific sub-genre of sports programming.

9. ***Marquee soccer programming.*** beIN broadcasts some of the same soccer events as NBC Sports, Universo, and Telemundo. In the United States, the 2018 CONCACAF World Cup Qualifiers were televised by beIN in English and by Telemundo and Universo in Spanish.⁹ Telemundo held rights to the Spanish-language broadcast of the 2018 Copa Libertadores, and beIN has since obtained both the Spanish- and English-language rights for this tournament from 2019 to 2022.¹⁰ The table below shows the U.S. broadcast rights to marquee soccer matches held by beIN and Comcast’s affiliates.

⁸ See *Game Show Network v. Cablevision Systems Corp.*, *Memorandum Opinion and Order*, 32 FCC Rcd. 6160, 6176 ¶ 50 (2017).

⁹ Jacobson Adam, *beIN Sports ‘Enhances’ Its Content Strategy*, Multichannel News (June 1, 2016), <https://www.multichannel.com/news/bein-sports-enhances-its-content-strategy-405296>; *Telemundo & Universo to Air Exclusive Coverage of CONCACAF Qualifiers for 2018 FIFA World Cup*, Broadway World (August 31, 2017), <https://www.broadwayworld.com/bwwtv/article/Telemundo-Universo-to-Air-Exclusive-Coverage-of-CONCACAF-Qualifiers-for-2018-FIFA-World-Cup-20170831>.

¹⁰ Ceysun Dixon, *Copa Libertadores Final to Air on Telemundo in the US*, SportsPro Media (Dec. 6, 2018), <http://www.sportspromedia.com/news/copa-libertadores-final-telemundo-tv-rights>; *beIN SPORTS Wins Exclusive Broadcast Rights to Copa Libertadores, Copa Sudamericana and Recopa Sudamericana*, Associated Press (Jan. 18, 2019), <https://www.apnews.com/7f640715d0c341e4a5bb412c96607fdb>.

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Current Television Broadcast Rights of Marquee Soccer

beIN	Comcast (NBCSN, Universo, Telemundo)
La Liga	English Premier League (NBCSN)
Ligue 1	FIFA World Cup (NBCSN)
CONCACAF: World Cup Qualifiers (English) (before 2019)	CONCACAF: World Cup Qualifiers
Copa Libertadores (2019+)	(Spanish, Telemundo)
Copa Sudamericana (2019+)	Copa América (2019, Spanish, Telemundo/Universo)
Recopa Sudamericana	
Copa Del Rey	Copa Libertadores (Spanish, Final Match, 2018, Telemundo)
El Clásico	
Coupe de France	Women's World Cup (Spanish, Telemundo/Universo)
Coupe de la Ligue	
French Super Cup	
Turkish Süper Lig	
African Cup of Nations	
Toulon Tournament	

10. **Advertisers.** The available evidence indicates a significant degree of overlap in advertisers between beIN and NBCSN, on the one hand, and beIN en Español and Universo, on the other. Nielsen advertising data show that beIN/NBCSN and beIN en Español/Universo advertised similar products to their audiences. Ranking advertised product categories by ad revenue reveals that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] are also advertised on NBCSN. Similarly, beIN en Español and Universo share [[BEGIN CONFIDENTIAL]]

REDACTED—FOR PUBLIC INSPECTION

[[END CONFIDENTIAL]] advertised by revenue. The data also show that the similar sets of advertisers purchased advertising on the networks at issue: beIN and NBCSN share

[[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] and beIN en Español and Universo share [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] As seen in the two tables below, the networks at issue overlap with respect to advertising product categories.

Common Advertising Product Categories by Network (beIN and NBCSN Rank (Top 15 by Ad Revenue))

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

REDACTED—FOR PUBLIC INSPECTION

**Common Advertising Product Categories by Network (beIN and Universo Rank (Top 15
by Ad Revenue))**

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

11. In addition, many overlapping advertisers provide products or services in markets that the NBC and beIN networks are especially suitable platforms for reaching. For example, Boost Mobile advertised on beIN en Español and Universo, suggesting that both platforms deliver a coveted demographic for a prepaid wireless services provider.

12. ***Demographics.*** The significant advertising overlap among the networks at issue is the likely consequence of the fact that their viewers share similar demographics. beIN and NBCSN are primarily watched by [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] beIN en Español and Universo share [[BEGIN CONFIDENTIAL]]

REDACTED—FOR PUBLIC INSPECTION

[[END CONFIDENTIAL]]

13. Comcast's allegation that beIN's demographics skew toward more affluent and younger viewers is plainly wrong.¹² The numbers do not tell Comcast's story. For 2018, the viewers of both beIN and NBC Sports [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] This is hardly the rich/poor picture painted by Comcast. In other words, the audiences of beIN and NBC Sports are substantially similar, with some metrics indicating that NBC Sports has the more affluent audience. As for beIN en Español and Universo, the median viewer age is very similar—[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]. Median incomes, too, between the networks are similar, with both networks having audiences that are likely to hold blue collar jobs.¹³

¹¹ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

¹² Answer ¶ 30.

¹³ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

REDACTED—FOR PUBLIC INSPECTION

14. Further, because beIN and beIN en Español, as of February 2019, are available to significantly less households than NBC Sports,¹⁴ it is misleading to claim that “only” [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of NBC Sports viewers also view beIN.¹⁵ It is more appropriate to look only at households where both networks are available. The available evidence indicates a significant degree of overlap in viewership between beIN and NBCSN on the one hand, and beIN en Español and Universo on the other.¹⁶ [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of beIN viewing households also watched NBC Sports.¹⁷ And the trend is upwards. For 2018, the number is [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]].¹⁸ The data is similar between beIN en Español and Universo. For the same periods, more than [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] and [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of beIN en Español viewing households also watched Universo.¹⁹ In 2018, the overall overlap between the four networks was [[BEGIN CONFIDENTIAL]]

¹⁴ Supplemental Declaration of Peter Litman ¶ 31, attached as Exhibit 4 to Answer (noting NBC Sports is available to over [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] million households).

¹⁵ Answer ¶ 31.

¹⁶ Singer Decl. ¶ 37.

¹⁷ Complaint ¶ 90.

¹⁸ This differs somewhat from the percentages provided by Dr. Lerner, who stated that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

Supplemental Declaration of Andres Lerner ¶¶ 30-31, attached as Exhibit 3 to Answer.

¹⁹ Complaint ¶ 90.

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[[END CONFIDENTIAL]] The overlap between the networks' viewers is illustrated in the chart below.²⁰

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

15. In attempting to distinguish its affiliated networks from the beIN networks, Comcast relies on ratings from the first half of 2018 that are unadjusted for the size of the audience to which each network has access. But Comcast itself dramatically affected these ratings by [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]].²²

²⁰ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

²¹ SNL Kagan, Comcast Packages 4Q 2017 (last accessed May 30, 2018).

²² *Id.*

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Ratings comparisons that are not adjusted for the dramatic difference in the number of people who could view a program if they want to are akin to comparing apples and oranges.

16. **Coverage Ratings.** Coverage area is a useful metric because it examines how well a network does when measured against the universe of its own base. Thus, that metric tends to level the playing field between a network with fewer than 20 million subscribers and a network with over 80 million subscribers and measures each network's popularity within its base.

17. Coverage area ratings demonstrate that both beIN and beIN en Español compare favorably with NBC Sports and Universo. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]. Comcast's coverage area ratings, which allegedly show that beIN's coverage area ratings have declined, are based on a non-standard sample.

18. Comcast's criticism of the coverage ratings—that they are meaningless in predicting ratings when a programmer is given broad distribution—is unsupported speculation shown to be false by a study conducted by beIN. beIN has studied its ratings over time in the Dallas market, where it was given broader distribution by Charter's predecessor Time Warner in

²³ Complaint ¶ 91.

²⁴ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

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2014. beIN's unadjusted ratings grew demonstrably and significantly upon the broadening of its distribution base and continued to grow at a pace that was more than six fold between June 2014 and June 2015. Thus, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]].

19. ***La Liga.*** As discussed in my declaration attached to beIN's complaint, beIN and Comcast compete for La Liga rights. This is only one of many instances of competition between beIN and Comcast. beIN and Comcast also previously competed for rights to the EPL, which is itself a competing league to La Liga. beIN and Comcast's subsidiaries also broadcast some of the *same* soccer events. In the United States, the 2018 CONCACAF World Cup Qualifiers were televised by beIN in English and by Telemundo and Universo in Spanish, while NBC Sports carries the popular Rugby Six Nations Championship, which beIN formerly carried. beIN has also acquired rights to the 2019 Copa Libertadores tournament; Telemundo had the rights to the finals of the 2018 tournament.²⁵ Furthermore, while NBC Sports broadcasts the EPL in the United States, beIN owns the rights to broadcast the EPL in various other countries.

20. ***Serie A.*** [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] Thus, beIN carried Serie A at the time of its initial complaint; it does not

²⁵ See Ceysun Dixon, *Copa Libertadores Final to Air on Telemundo in the US*, SportsPro Media (Dec. 6, 2018), <http://www.sportspromedia.com/news/copa-libertadores-final-telemundo-tv-rights>.

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carry it now. As Comcast recognizes, beIN clearly represented to Comcast in negotiations that it was unlikely to renew rights to Serie A.²⁶

21. ***Most-Favored Nations Provisions.*** It is well known in the industry that Comcast is a market maker, and that a distribution decision by Comcast makes it hard to achieve better distribution on other systems.²⁷ [[BEGIN CONFIDENTIAL]]

²⁶ Answer ¶ 14.

²⁷ Reply Declaration of Eric Sahl ¶ 13, attached as Exhibit 4; *see* Tennis Channel, Inc. v. Comcast Cable Communications, *Memorandum Opinion and Order*, 27 FCC Rcd. 8508, 8534-35 ¶ 73 (2012) (record illustrates that “MVPDs would often ‘inquire about Tennis Channel’s level of carriage on Comcast’ and would often follow Comcast’s lead”).

²⁸ *See* Promoting the Availability of Diverse and Independent Sources of Video Programming, *Notice of Proposed Rulemaking*, 31 FCC Rcd. 11352, 11353 ¶ 2 (2016) (“Because restrictive contract provisions limit the incentives and ability of independent programmers to experiment with innovative carriage terms and to license their content on alternative, innovative platforms, they deprive consumers of the benefits that otherwise would flow from enhanced competition in the video programming and distribution marketplace.”).

²⁹ *Id.* at 11363 ¶ 19 (“However, we are not persuaded based on the record that such justifications exist for MFN provisions that are unconditional and thus permit ‘cherry picking’ of the best contract terms. Because, as noted above, unconditional MFN provisions entitle an MVPD to the most favorable terms granted to other distributors without obligating the MVPD to provide the same or equivalent consideration in exchange for those terms, such provisions appear designed to discourage or foreclose the wider distribution of video content, including on online platforms.”).

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[[END CONFIDENTIAL]], it is a significant constraint on beIN's negotiations with other distributors.

22. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

23. *Comcast's offer unreasonably restrains beIN's ability to compete.* My initial declaration in this matter, attached to the December 13, 2018 complaint, discusses in detail how the December 13, 2017 offer unreasonably restrains beIN's ability to compete. beIN's ability to compete continues to be restrained. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

24. [[BEGIN CONFIDENTIAL]]

³⁰ See 2012 Comcast and beIN Agreement, Section 15.1, attached as Exhibit 4 to Complaint.

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[[END CONFIDENTIAL]] Comcast's claim that other distributors treated beIN negatively is circular, as it is likely the result of Comcast's own conduct here. Because AT&T's dropping of beIN was precipitated by Comcast's action, it cannot be plausibly used to justify it.

25. [[BEGIN CONFIDENTIAL]]

[[END
CONFIDENTIAL]]

26. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

27. [[BEGIN CONFIDENTIAL]]

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[[END

CONFIDENTIAL]]

28. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

29. [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]]

30. [[BEGIN CONFIDENTIAL]]

CONFIDENTIAL]]

31. These harms are not from beIN’s “own poor business decisions and strategy,” as alleged by Comcast.³¹ Rather, they are a direct consequence of Comcast’s discriminatory behavior. Comcast tries to claim that these results “follow[ed] the parties’ impasse” and “are entirely unrelated to Comcast’s December 2017 Offer.”³² It is inappropriate for Comcast to discriminate against beIN, drop it from its packages, and then turn around and claim that all of the foreseeable effects of its discriminatory behavior are somehow beIN’s fault. The program carriage rules exist to protect independent video programming vendors from being faced with a choice between accepting a discriminatory offer or being dropped by an MVPD. beIN should not be forced to accept a discriminatory offer or face the potentially ruinous effects of a blackout. Comcast cannot rely on beIN being available on its X1 platform through the Sling TV app to justify its actions. First, beIN is not available at all to those Comcast customers who are not on the X1 platform. Second, the OTT video feed of beIN available through Sling’s \$10 World Sports package on the Xfinity platform is not a substitute for delivery of beIN via Comcast’s linear cable system. Comcast also does not mention that the viewing of content on that package counts against Comcast data caps and hence is a substantially inferior alternative. Nor does Comcast discuss the subscribers who have an interest both in beIN and in other networks available on Comcast’s Sports and Entertainment or Español packages but not on the Sling package. For them, continuing to watch beIN would require forking over another \$10 a month.

³¹ Answer ¶ 64.

³² *Id.* ¶ 63.

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32. In arguing that its Sports and Entertainment and basic Latino add-on packages cost approximately the same price as Sling’s World Sports package,³³ Comcast ignores the substantial programming differences between its Sports and Entertainment and Latino packages, and Sling’s World Sports package.

33. Comcast’s Sports and Entertainment package includes: CBS Sports Network (SD and HD); Crime & Investigation Network; CMT; ESPN Classic; ESPN News (HD and SD); ESPNU (SD and HD); Military History Channel; MLB Network (HD and SD); Fox Sports Regional Networks; The Sportsman Channel; NBA TV (HD and SD); NFL Network (HD and SD); NHL Network; Outdoor Channel (HD and SD); Pac-12 Network; Tennis Channel (HD and SD); and World Fishing Network (HD and SD).

34. Comcast offers four versions of its add-on Latino package. The smallest package—Basic Latino—includes SD and HD feeds for 31 different networks. The largest package—Starter Latino— includes SD and HD feeds for 81 different networks.

35. Sling’s World Sports package, on the other hand, includes: beIN, beIN en Español, beIN SPORTS Connect, Nautical Channel, Outside Television, TRACE Sport Stars, Willow Cricket, and Willow Extra.

36. None of the 17 different networks available on the Sports and Entertainment package, nor any of the 31 to 81 networks offered on Comcast’s various Latino packages, overlaps with the limited networks available on Sling’s World Sports package. Thus, a Comcast customer that wants to access to both beIN and one or more networks on the Sports and Entertainment, for example, must incur costs of approximately \$20 per month to obtain both

³³ *Id.* ¶ 3.

REDACTED—FOR PUBLIC INSPECTION

channels—\$10 for the World Sports package³⁴ and another \$9.95 for Comcast’s Sports and Entertainment package³⁵—as opposed to the \$9.95 per month cost incurred prior to August 1, 2018. Comcast ignores these costs in its analysis. Additionally, the use of Sling on the X1 box will count against the data cap imposed by Comcast, another incurred cost that Comcast ignores.³⁶

37. ***Comcast Rate Practices.*** As recently as last year, Comcast increased its fees for its XFINITY packages without adding channels,³⁷ as well as raised the additional “Broadcast TV” and “Regional Sports Network” fees it charges.³⁸ Comcast already has been increasing its rates with frequency and apparent insouciance.

38. [[BEGIN CONFIDENTIAL]]

³⁴ *Id.*

³⁵ *Add-On Channels*, Comcast, <https://www.xfinity.com/learn/digital-cable-tv/sports> (last visited May 6, 2019).

³⁶ *Sling International and Sling World Sports on X1 FAQs*, Comcast, <https://www.xfinity.com/support/articles/sling-international-on-x1-faqs> (last visited May 6, 2019) (“Sling International and Sling World Sports programming is delivered over your Xfinity Internet service to your X1 TV Box and is therefore subject to the rules, terms and conditions that govern Xfinity Internet service, including any data usage plans that may apply.”).

³⁷ Paul Resnikoff, *Comcast Substantially Increases 2018 Rates, Says Customers ‘Getting More for Their Money,’* Digital Music News (Jan. 3, 2018), <https://www.digitalmusicnews.com/2018/01/03/comcast-increases-2018/>.

³⁸ Jon Brodtkin, *Comcast Raises Cable TV Bills Again—Even If You’re Under Contract*, ArsTechnica (Nov. 26, 2018), <https://arstechnica.com/tech-policy/2018/11/comcasts-controversial-tv-and-sports-fees-rise-again-hit-18-25-a-month/>.

³⁹ See SNL Kagan Profile for NBC Sports, attached as Exhibit 8 to beIN’s Reply.

⁴⁰ See SNL Kagan Profile for Universo, attached as Exhibit 9 to beIN’s Reply.

REDACTED—FOR PUBLIC INSPECTION

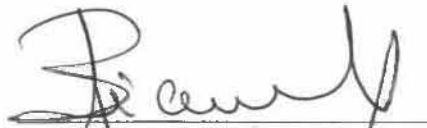
[[END CONFIDENTIAL]].

REDACTED—FOR PUBLIC INSPECTION

* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on May 6, 2019

A handwritten signature in dark ink, appearing to read "Antonio Briceño", written over a horizontal line.

Antonio Briceño
Deputy Managing Director,
US & Canada
beIN Sports, LLC

REDACTED—FOR PUBLIC INSPECTION

APPENDIX A

6:47p 49 °F

... / Sports / Soccer

Featured



Tables & Standings



Latest News

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EXHIBIT 2

REDACTED—FOR PUBLIC INSPECTION
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	File No. CSR-8972-P
)	
v.)	
)	
COMCAST CABLE COMMUNICATIONS,)	
LLC,)	
And)	
COMCAST CORPORATION,)	
Defendants.)	
)	
)	
TO: Chief, Media Bureau)	

REPLY DECLARATION OF KEN TOLLE

REDACTED—FOR PUBLIC INSPECTION

I, Ken Tolle, being over 18 years of age, swear and affirm as follows:

1. I make this declaration using facts of which I have personal knowledge or based on information provided to me, in connection with the program carriage complaint of beIN Sports, LLC (“beIN”) against Comcast Cable Communications, LLC (“Comcast”) and the effects of Comcast’s program carriage offer on beIN.

2. I filed an initial declaration in this matter on December 13, 2018, which was included as Exhibit 9 to beIN’s complaint. My qualifications are discussed in that declaration.

3. I prepared and delivered beIN’s offers to Comcast and participated in, or supported, negotiations between beIN and Comcast.

4. ***HD carriage, authentication, and direct-to-consumer offerings.*** Comcast’s December 13, 2017 offer [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]]

6. Comcast's seemingly ubiquitous HD carriage for NBC Sports and Universo, compared to [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] is particularly jarring: the enjoyment of sports programming depends crucially on the quality of its resolution. Comcast does not even try to argue that it derives some sort of benefit from the discrepancy. There is no such benefit; in fact, there are increased costs. [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] This is both costly for Comcast and deprives Comcast's viewers of the high-quality content for which they pay. It is a good thing only for Comcast's programming affiliates, [[BEGIN CONFIDENTIAL]]

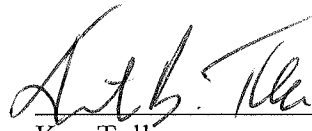
[[END CONFIDENTIAL]]

REDACTED—FOR PUBLIC INSPECTION

* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on May 6, 2019



Ken Tolle
President and Senior Advisor
Launch Pad Media Advisors

REDACTED—FOR PUBLIC INSPECTION

EXHIBIT 3

REDACTED—FOR PUBLIC INSPECTION
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	File No. CSR-8972-P
)	
v.)	
)	
COMCAST CABLE COMMUNICATIONS,)	
LLC,)	
And)	
COMCAST CORPORATION,)	
Defendants.)	
)	
)	
TO: Chief, Media Bureau)	

REPLY DECLARATION OF ROY MEYERINGH

REDACTED—FOR PUBLIC INSPECTION

I, Roy Meyeringh, being over 18 years of age, swear and affirm as follows:

1. I make this declaration using facts of which I have personal knowledge or based on information provided to me, in connection with the program carriage complaint of beIN Sports, LLC (“beIN”) against Comcast Cable Communications, LLC (“Comcast”) and the effects of Comcast’s program carriage offer on beIN.

2. I filed an initial declaration in this matter on December 13, 2018, which was included as Exhibit 11 to beIN’s complaint. My qualifications are discussed in that declaration.

3. I prepared and delivered beIN’s offers to Comcast and participated in, or supported, negotiations between beIN and Comcast.

4. *beIN’s assurances.* In my initial declaration, I discussed that, [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]]

5. Comcast’s witnesses claim that these leagues, [[BEGIN CONFIDENTIAL]]

¹ Declaration of Roy Meyeringh ¶ 9, attached as Exhibit 11 to the Complaint.

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[[END CONFIDENTIAL]] This is incorrect.

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

6. Comcast's contention that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] is

also incorrect.³ [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]]

7. [[BEGIN CONFIDENTIAL]]

² Answer, Response to Numbered Paragraphs ¶ 52; Supplemental Declaration of Dr. Andres Lerner ¶¶ 6-7, attached as Exhibit 3 to Answer ("Lerner Suppl. Decl."); Declaration of Justin Smith ¶ 26, attached as Exhibit 2 to Answer.

³ Answer ¶ 14.

[[END CONFIDENTIAL]]

8. ***Vertical integration of AT&T.*** AT&T is vertically integrated, having acquired Time Warner, which holds the rights to soccer and other sports programming, in mid-2018. In June 2018, Judge Leon ruled that the Department of Justice (“DOJ”) failed to make the case that the merger was anticompetitive. Immediately after the decision, AT&T issued a press release announcing that it had completed its acquisition of Time Warner.⁶ In the same month, AT&T announced a new service called WatchTV, a bundle comprised largely of Time Warner content.⁷ The DOJ appealed the case to the D.C. Circuit, but lost in February 2019. Based on the nature of the questions during oral arguments in December 2018, several analysts understood that the DOJ’s appeal would not succeed.⁸

⁴ Complaint, Exhibit 3 (Letter from Pantelis Michalopoulos and Georgios Leris, Steptoe & Johnson, LLP, Counsel for beIN Sports, to Drew Brayford, Senior Vice President, Content Acquisition, et al., Comcast, at 3 (Dec. 3, 2018).

⁵ See Lerner Suppl. Decl. ¶ 14.

⁶ See *AT&T Completes Acquisition of Time Warner, Inc.*, AT&T (June 15, 2018), https://about.att.com/story/att_completes_acquisition_of_time_warner_inc.html.

⁷ See, David Dayen, *The AT&T–Time Warner Merger Is Already What the Government Feared*, New Republic (June 22, 2018), <https://newrepublic.com/article/149305/atttime-warner-merger-already-government-feared>.

⁸ See, Hamza Shaban, *It’s Not Looking Great for The Justice Department’s Appeal of The AT&T–Time Warner Merger*, Washington Post (Dec. 6, 2018),

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9. In terms of soccer programming, offerings from AT&T's TNT network include the UEFA Champions League, UEFA Europa League, and the UEFA Super Cup.⁹ These tournaments involve the top teams from each of the various European leagues, including both La Liga and the EPL, competing head to head. And AT&T's TBS and TNT telecast MLB and NBA games, respectively.

10. ***Overwhelming customer response to Comcast dropping beIN.*** Comcast's claims that it experienced minimal customer response to its dropping of beIN from its systems is contradicted by the overwhelming response that beIN received. beIN's website dedicated to informing customers about beIN's dispute with Comcast has received 2.4 million visitors since beIN was dropped by Comcast.

11. Comcast also claims incorrectly that the [[BEGIN CONFIDENTIAL]]

https://www.washingtonpost.com/technology/2018/12/06/its-not-looking-great-justice-departments-appeal-att-time-warner-merger/?utm_term=.d737234f7113.

⁹ *Where to Find Soccer Leagues and Competitions on US TV and Streaming*, World Soccer Talk, <http://worldsoccertalk.com/where-to-find-soccer-on-us-tv-and-streaming/>.

¹⁰ Answer ¶ 47.

[[END CONFIDENTIAL]]

12. Furthermore, Comcast barely acknowledges [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

¹¹ *Id.*

¹² *See* SNL Kagan Profile for NBC Sports, attached as Exhibit 8.

¹³ *See* SNL Kagan Profile for Universo, attached as Exhibit 9.

REDACTED—FOR PUBLIC INSPECTION

* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on May 6, 2019

A handwritten signature in black ink, appearing to read 'Roy Meyeringh', written over a horizontal line.

Roy Meyeringh
Vice President of Business Development and
Affiliate Sales
beIN Sports LLC

REDACTED—FOR PUBLIC INSPECTION

EXHIBIT 4

REDACTED—FOR PUBLIC INSPECTION
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	File No. CSR-8972-P
)	
v.)	
)	
COMCAST CABLE COMMUNICATIONS,)	
LLC,)	
And)	
COMCAST CORPORATION,)	
Defendants.)	
)	
)	
TO: Chief, Media Bureau)	

REPLY DECLARATION OF ERIC SAHL

REDACTED—FOR PUBLIC INSPECTION

I, Eric Sahl, being over 18 years of age, swear and affirm as follows:

1. I filed an initial declaration in this matter on December 13, 2018, which was included as Exhibit 10 to beIN's complaint. My qualifications are attached to that declaration. In sum, I have devoted more than 16 years to negotiating programming agreements on both sides of the distributor/programmer divide, and advising on program carriage in the television industry.

2. At the request of beIN, I offered in my initial declaration my expert view on: (1) whether beIN's offers to Comcast were sufficiently specific and in line with standards in the industry; and (2) whether the programming as described was similarly situated to Comcast's programming and was described sufficiently to prove discrimination. I answered both these questions in the affirmative. In this reply declaration, I provide additional testimony that both the like-to-like mechanism and [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] are standard in the industry and reasonable in these factual circumstances. I also discuss the relevance of the length of tune-in metric, and Comcast's dominance in setting industry-wide rate levels. I have reviewed Comcast's Answer in this proceeding, along with associated exhibits and Declarations submitted with the Answer, including Declarations by Messrs. Brayford, Smith and Litman and Dr. Lerner.

3. Comcast's Answer does not alter my conclusions that: (1) beIN's offers to Comcast were sufficiently specific and in line with standards in the industry; and (2) the programming as described was similarly situated to Comcast's programming and was described sufficiently to prove discrimination.

4. *The like-for-like mechanism is sufficiently specific.* In my view, the like-for-like mechanism proposed by beIN is a reasonable tool for enhancing certainty around rights. First of

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all, Comcast’s claim that beIN could replace programming with “sports and non-sports content” is unfounded.¹ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] This means

that beIN guaranteed that it would continue to carry significant soccer content. This guarantee was backed by beIN’s strong reputation in the industry as a network providing strong content, and [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

5. Dr. Lerner is incorrect to contend that [[BEGIN CONFIDENTIAL]]

¹ Answer ¶ 16.

² Complaint ¶ 48.

³ *Id.* ¶ 52.

⁴ Supplemental Declaration of Andres Lerner ¶¶ 2, 5, attached as Exhibit 3 to Answer.

⁵ Complaint ¶ 52.

⁶ *Id.* ¶ 52.

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[[END CONFIDENTIAL]]

6. To a significant degree, there is no certainty about the future performance of networks that are bought for distribution in the pay television industry. The distribution buyer is placing a bet based on past performance and/or current carriage and rights. This lack of certainty regarding live sports programming is especially significant. In my opinion, the like-for-like clause should provide more, not less, assurance for Comcast in a world fraught with inherent uncertainties that are beyond both the rights holder's and distributor's control, such as: the relocation of franchises, player trades, player contracts, player injuries, labor strikes, and player performance variation. As one example, soccer stars can, and often do, move from one national league to another. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

For Comcast, this bounded flexibility mitigates the risk of being stuck with a league whose major stars are gone.

7. Dr. Lerner, who fails to describe his experience in sports-programming contract design,⁷ is wrong to assert that the proposed like-for-like clause is uncommon.⁸ First, Dr. Lerner fails to explain how such uncertainty was dealt with in any of the “hundreds of sports programming agreements” he has reviewed.⁹ Second, loss of sports rights clauses, such as the like-for-like mechanism proposed by beIN, are common in the negotiation of regional and national live sports networks. This gives rights holders the flexibility to bid for rights as they

⁷ See Declaration of Hal Singer ¶ 47, attached as Exhibit 5.

⁸ Lerner Suppl. Decl. ¶¶ 2, 5.

⁹ *Id.* ¶ 5.

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become available and, in the case of the loss of rights, the ability to remain viable for future rights bids. Likewise, if for example a team switches to another network during the term, this ensures that the distributor does not double pay for the same live sports rights. This bilateral flexibility for both the rights holder and the distributor is essential as sports rights, and soccer rights in particular, are often bid on for short term durations, rarely exceeding three to five years. In fact, many live sporting events are bid on annually: the World Cup, the Summer/Winter Olympic games, and the Super Bowl.

8. In sum, the like-for-like mechanism proposed by beIN helps to reduce the inherent uncertainty regarding such rights that are subject to regular competitive bidding, and thus where it is impossible to guarantee renewal of such rights. Moreover, I understand that, [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]]

9. [[BEGIN CONFIDENTIAL]]

¹⁰ Reply Declaration of Roy Meyeringh ¶ 7, attached as Exhibit 2.

¹¹ Lerner Suppl. Decl. ¶ 14.

[[END CONFIDENTIAL]]

11. *Passion does not signify a niche network.* Comcast dismisses length of tune-in ratings without providing a sufficient basis for doing so; rather, Comcast's witness Dr. Litman argues that such ratings simply show that soccer programming is [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

13. *Comcast sets industry wide rate levels.* Comcast's attempt to lay blame at the doorstep of other distributors and to beIN (everyone but Comcast itself) ignores Comcast's

¹² Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4259-62 ¶¶ 49-59 (2011)

¹³ Ted Johnson, *Judge Will Allow AT&T-Time Warner to Use Arbitration Offer in Defense of Merger*, Variety (Mar. 13, 2019), <https://variety.com/2018/biz/news/att-time-warner-antitrust-trial-arbitration-offer-1202725268/>.

¹⁴ Meyeringh Reply Decl. ¶ 7.

¹⁵ Declaration of Peter Litman ¶¶ 35-36, 55 (attached as Attachment A to Exhibit 4 of Answer); Answer ¶ 33.

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immense power in dictating industry wide rate levels. It is well known in the industry that Comcast is the market maker, and that a distribution decision by Comcast makes it hard to achieve better distribution on other systems.

14. [[BEGIN CONFIDENTIAL]]

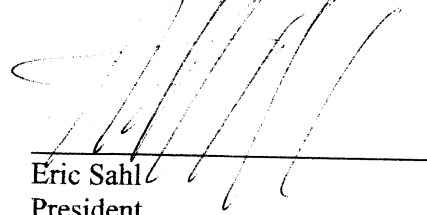
[[END CONFIDENTIAL]]

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* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on May 6, 2019


Eric Sahl
President
ID Media LLC

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EXHIBIT 5

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Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
beIN Sports, LLC,)
Complainant,)
v.)
)
COMCAST CABLE COMMUNICATIONS,)
LLC,)
A Subsidiary of	
COMCAST CORPORATION,	
Defendant.	

TO: Chief, Media Bureau

DECLARATION OF HAL SINGER

1. I am a Managing Director at Econ One. I am also a Senior Fellow at the George Washington Institute of Public Policy and an Adjunct Professor at Georgetown University, McDonough School of Business, where I teach advanced pricing to MBA candidates.

2. My areas of economic expertise are antitrust, industrial organization, finance, and regulation. I have applied my expertise to several regulated industries, including telecommunications, video programming, insurance, and health care.

3. I am the co-author of the book *Broadband in Europe: How Brussels Can Wire the Information Society* (Kluwer/Springer Press 2005), and co-author of the book *Need for Speed: A New Framework for Telecommunications Policy for the 21st Century* (Brookings Institution Press 2013).

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4. I have published scholarly articles in many economics and legal journals. Five of my articles are of particular relevance to this proceeding: “Vertical Integration in Cable Networks: A Study of Regional Sports Networks,” *Review of Network Economics* (forthcoming 2013); *Review of Tim Wu’s Master Switch*, *Milken Institute Review* (January 2012); “Addressing the Next Wave of Internet Regulation: Toward a Workable Principle for Nondiscrimination,” *Regulation and Governance* (Vol. 4, No. 3, pp. 365-82, 2010); “Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators,” *Review of Network Economics* (Vol. 6, No. 3, 2007); and “The Competitive Effects of a Cable Television Operator’s Refusal to Carry DSL Advertising,” *Journal of Competition Law and Economics* (Vol. 2, No. 2, pp. 301-31, 2006).

5. In regulatory proceedings, I have presented economic testimony in several forums, including the U.S. Federal Communications Commission, the U.S. Federal Trade Commission, the Antitrust Division of the U.S. Department of Justice, the U.S. National Highway Traffic and Safety Administration, the House of Commons of Canada, the Canadian Radio-television and Telecommunications Commission, and the U.S. Congressional Budget Office. My written testimony on the effect of telecom entry on video competition was cited extensively by the Department of Justice in a November 2008 report titled *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers*. I have advised the Canadian Competition Bureau on two matters concerning the video programming industry.

6. In program carriage disputes, I have served as an economic expert for the Tennis Channel, GSN, NFL Network and MASN, which owns the television rights to live baseball games of the Baltimore Orioles and the Washington Nationals.

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7. In addition to these cable-programming disputes, I have served as a testifying expert in several litigation matters. My experience as a testifying expert in litigation is summarized in my Curriculum Vitae, which is included as Appendix A.

8. I earned M.A. and Ph.D. degrees in economics from the Johns Hopkins University and a B.S. magna cum laude in economics from Tulane University.

9. I file this report in my individual professional capacity. I have no financial stake in the outcome of this case.

ASSIGNMENT, BACKGROUND, AND SUMMARY OF CONCLUSIONS

10. I have been asked by counsel for beIN Sports, LLC (“beIN”) to respond to the brief by Comcast Corporation and Comcast Cable Communications, LLC (together, “Comcast”)¹ and to the opinions of Comcast’s economic expert, Dr. Andres Lerner,² and those of Comcast’s media consultant, Mr. Peter Litman.³

11. By way of background, I understand that from on or around August 2012 until July 31, 2018, Comcast carried beIN and beIN en Español (“beINE”) on Comcast’s “Sports and Entertainment” tier, as well as beINE on Comcast’s “Latino” tier.⁴ As a result, as of the middle of 2018, beIN or beINE (or both) were distributed to [[BEGIN CONFIDENTIAL]]

1. Comcast Answer to Second Complaint, MB Dkt. No. 18-384, February 11, 2019 [hereafter, Comcast Answer].

2. Supplemental Declaration of Dr. Andres Lerner (February 11, 2019) [hereafter, Lerner Suppl. Decl.]. *See also* Declaration of Dr. Andres Lerner (May 14, 2018) [hereafter, Lerner Decl.].

3. Supplemental Declaration of Peter Litman (February 11, 2019) [hereafter, Litman Suppl. Decl.]. *See also* Declaration of Peter Litman (May 11, 2018) [hereafter, Litman Decl.].

4. Program Carriage Complaint, MB Dkt. No. 18-384, Dec 13, 2018, ¶42 [hereafter, Second Complaint]. According to the Second Complaint, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] *Id.* ¶117.

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[[END CONFIDENTIAL]] Moreover, about

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] had access to *both* beIN networks, because beINE was available on both the Sports and Entertainment and Latino packages. Comcast [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

12. In negotiations with Comcast in April 2017, beIN [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Comcast countered in December 2017 (the “Comcast Counter”) by [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] On August 1, 2018, Comcast removed beIN from its platform (the “Removal”).

5. See Table 1B, *infra* (as of the middle of 2018).
6. *Second Complaint*, ¶43.
7. *Id.*
8. *Id.*
9. *Id.* ¶47.

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13. beIN alleges that Comcast’s Counter was unlawfully discriminatory—that is, Comcast (1) affords disparate treatment of similarly situated networks on (2) the basis of beIN’s lack of affiliation with Comcast—and that the discriminatory conduct (3) unreasonably restrains beIN’s ability to compete fairly. I understand that these three elements, if proven, would constitute a violation of Section 616 of the Cable Act. beIN further alleges, based on information it has received, that Comcast [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] I will refer to Comcast’s conduct at issue here collectively as the “Challenged Conduct.” Such evidence speaks directly to Comcast’s discriminatory motivation for its Counter and its Removal of beIN and beINE, and thereby could obviate the need to draw inferences about Comcast’s motivation based on any surrogate test.

14. My conclusions can be summarized as follows:

- Comcast and its economic experts have misapplied the “net benefit” test:
 - The net benefit test that the D.C. Circuit applied in the *Tennis Channel* case does not apply here, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

- Even assuming that the net benefit test is appropriate here, Comcast and its experts have failed to show that the conduct at issue would make economic sense absent Comcast’s incentives to steer viewers away from beIN and beINE and towards its own, similarly situated networks.

10. See Comcast Answer, Response to Numbered Paragraphs ¶4.

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- Under beIN's April 2017 and February 2018 offers, Comcast would have [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

- Dr. Lerner's implementation of the net benefit test does not entail any original analysis of his own. He simply accepts estimates submitted by a Comcast executive, Mr. Brayford, who in turn relies on an undisclosed analysis by Enterprise Business Intelligence ("EBI").¹¹ Mr. Litman does the same.¹² Dr. Lerner's willingness to opine on the net benefit test under these circumstances is inconsistent with standard economic practice.
- Although the details of Comcast's net benefit test have not been made available to me (or, per my understanding, to anyone outside of Comcast and EBI), certain deficiencies are obvious from the available descriptions.
 - Comcast's experts ignore certain downstream losses in the net benefit test. Most obviously, Comcast's experts ignore the revenue Comcast potentially lost when beIN and beINE loyalists dropped their subscription to Comcast's Sports and Entertainment or Latino tiers, as opposed to dropping Comcast altogether.¹³
 - Comcast's experts also ignore mitigation costs—that is, any costs that Comcast incurred to prevent dissatisfied subscribers from dropping the Sports and Entertainment or Latino tiers, or from dropping Comcast altogether. In my experience implementing the net benefit test, this component proved to be economically significant.
 - Comcast's experts also fail to provide any evidence to support the dubious proposition that Comcast consistently imposes the same net benefit test on its own affiliated networks. If Comcast applied the net benefit test selectively to beIN, then such conduct would be consistent with discrimination on the basis of affiliation.
 - Comcast may have expected that subscriber cancellations would have been limited due to the likelihood that other distributors would follow suit. Indeed, AT&T—currently the largest distributor, effectively vertically

11. Lerner Suppl. Decl. ¶¶50-51; Declaration of Andrew Brayford (February 11, 2019) [hereafter, Brayford Decl.] ¶¶48-51.

12. Mr. Litman opines that Mr. Brayford's implementation of the net benefit test is "very thorough and reasonable." Litman Decl. ¶77. Dr. Lerner does not.

13. Brayford Decl. ¶31 (examining "Comcast customers who currently subscribe to a package that includes the beIN networks leaving Comcast.").

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integrated since mid-2018¹⁴—has already done so. By this logic, any form of discrimination by Comcast could pass the net benefit test, provided that the independent network disappears from a sufficiently large competing distributor as a result of Comcast’s discrimination.

- The response of Comcast’s distribution rivals to the Removal cannot serve as a reasonable proxy for the decision-making of a non-vertically integrated, non-conflicted distributor:
 - Comcast’s claim that other distributors such as AT&T treated beIN negatively is circular, as it is likely the result of Comcast’s own conduct here.¹⁵
 - When one distributor drops a channel from its offerings, this relieves competitive pressure on rival, in-region distributors to keep the channel in their lineups.
 - AT&T cannot serve as a proxy for a non-vertically integrated distributor in light of its recent acquisition of Time Warner. In terms of soccer programming, AT&T’s TNT offerings include UEFA Champions League, UEFA Europa League, and the UEFA Super Cup. And AT&T’s TBS and TNT telecast MLB and NBA games, respectively. As such, AT&T competes directly with beIN for soccer rights.
 - A better proxy for the treatment of beIN is the contemporaneous carriage by distributors that were not vertically integrated into sports programming (“non-conflicted” distributors). At the time of Comcast’s Counter, those non-conflicted distributors [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

- Prior to the Comcast Counter, whether measured on a “carry both networks” or “carry either network” standard, beIN’s penetration on Comcast was [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]]

- Had beIN accepted Comcast’s Counter, per Kagan data, beIN’s penetration under the “carry both” standard would have [[BEGIN CONFIDENTIAL]]

14. In June 2018, Judge Leon ruled that the Department of Justice (DOJ) failed to make the case that the merger was anticompetitive. Immediately after the decision, AT&T issued a press release announcing that it had completed its acquisition of Time Warner. *See* AT&T Completes Acquisition of Time Warner, Inc., June 15, 2018, available at https://about.att.com/story/att_completes_acquisition_of_time_warner_inc.html. In the same month, AT&T announced a new service called WatchTV, a bundle comprised largely of Time Warner content. *See, e.g.,* David Dayen, *The AT&T-Time Warner Merger Is Already What the Government Feared*, NEW REPUBLIC, June 22, 2018. The DOJ appealed the case to the D.C. Circuit, but lost in February 2019. Based on the nature of the questions during oral arguments in December 2018, several analysts understood that the DOJ’s appeal would not succeed. *See, e.g.,* Hamza Shaban, *It’s not looking great for the Justice Department’s appeal of the AT&T-Time Warner merger*, WASHINGTON POST, Dec. 6, 2018.

15. Reply Declaration of Antonio Briceño (May 6, 2019) ¶24, attached as Exhibit 1 to beIN’s Reply [hereafter, Briceño Reply Decl.].

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[[END CONFIDENTIAL]]

- Had beIN accepted Comcast's Counter, per Kagan data, beIN's penetration under the "carry either network" standard would have [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]]

- beIN and beINE are similarly situated to the NBC Sports Network ("NBCSN"), Telemundo, and Universo in that all five networks televise soccer programming from European and South American leagues, and Comcast's assertions to the contrary are not compelling:
 - Comcast's experts' claims are inconsistent with the findings of the FCC's Administrative Law Judge (ALJ) and the Commission in *Tennis Channel v. Comcast*, in which a network that focused exclusively on tennis programming was deemed similarly situated to Comcast's NBC Sports Network (then called Versus), which carried an array of sports programming, excluding tennis. In particular, Versus carried cycling (Tour de France), MMA (WEC), lacrosse, soccer, college football, regattas (America's Cup), and Indy Racing. In contrast, NBCSN and Universo televise a significant amount of live soccer programming, implying that NBCSN is closer to beIN in product space than NBCSN was to Tennis Channel.
 - The program-carriage provisions, as interpreted by the ALJ and the Commission, were not meant to protect independent networks that were *identically* situated, but instead were meant to protect *similarly* situated networks. If the provisions were as narrow as Comcast's experts presume, then Comcast effectively would be immunized from the nondiscrimination regime so long as it did not own a perfect clone of beIN, even if Comcast provided a significant amount of soccer programming on three of its affiliated networks (as it does).
 - The available evidence indicates that beIN and NBCSN on the one hand, and beINE and Universo on the other, compete for substantially the same viewers and advertisers.
 - As Comcast's experts acknowledge, high-profile, "marquee" sporting events disproportionately drive viewership and advertising, particularly among sports networks. In addition to televising marquee soccer events of similar quality, beIN and Comcast's affiliates (NBCSN, Universo, and Telemundo) broadcast some of the same soccer events, including the 2018 CONCACAF World Cup Qualifiers, the 2018 Copa Libertadores, and the English Premier League in various countries abroad.
- As a result of Comcast's discriminatory offer and the resulting discontinuation of beIN carriage, beIN likely was materially impaired in its ability to compete for viewers and advertisers:

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- beIN [[BEGIN CONFIDENTIAL]]
[[END CONFIDENTIAL]]
 - beIN [[BEGIN CONFIDENTIAL]]
[[END CONFIDENTIAL]]
 - beIN lost carriage on AT&T and failed to secure broader carriage on Verizon and on Charter, all of which was potentially caused by beIN's weakened bargaining power. AT&T and Verizon both compete against Comcast in-region in terms of price and quality, and Comcast's removal of beIN reduced AT&T's and Verizon's need to carry beIN on the quality dimension.
 - beIN's [[BEGIN CONFIDENTIAL]]
[[END CONFIDENTIAL]]
 - That beIN is still available to Comcast subscribers with a broadband connection through Internet-based platforms such as SlingTV (which counts against Comcast's customers' bandwidth caps) does not compensate for this impairment.
- Comcast's experts provide no credible economic foundation for purported "uncertainty" in beIN's future programming as a justification for the conduct at issue:
 - Comcast cannot cite uncertainty as an *ex ante* basis for dropping beIN, especially given its vertical integration into competing sports programming and the *ex post* remedies for addressing beIN's potential loss of key programming under the carriage contract.
 - With regard to the "like-for-like" provision, Dr. Lerner assumes the worst case, [[BEGIN CONFIDENTIAL]]
[[END CONFIDENTIAL]]
- Dr. Lerner faults beIN for [[BEGIN CONFIDENTIAL]]
[[END CONFIDENTIAL]] and he suggests that other sports networks have made commitments with this duration. But he neglects to mention that even his example (NBCSN) suffers from the same uncertainty—NBCSN cannot guarantee carriage of the NHL, NASCAR, English Premier

16. [[BEGIN CONFIDENTIAL]]
[[END CONFIDENTIAL]]

17. Second Complaint ¶126. *See also* Declaration of Antonio Briceño (December 13, 2018), ¶54 [hereafter, Briceño Decl.]. Mr. Briceño is the Deputy Managing Director, United States and Canada, for beIN. *Id.* ¶2.

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League (EPL), or the Olympics beyond the duration of NBCSN's contracts with the underlying rightsholders. The only sports networks that could make such a guarantee are those that own the underlying rights to their marquee programming, such as NFL Network or MASN (Orioles) or MLB Network.

- In fact, just as important, Mr. Litman attests to what representations NBC Sports makes in its dealings with distributors. These representations make clear that NBC Sports provides distributors with, if anything, *less* certainty than beIN does. As Mr. Litman puts it, NBC Sports {{BEGIN HCI}}

{{END HCI}}¹⁸ On the other hand, {{BEGIN HCI}}

{{END HCI}} Mr. Lerner provides no evidence to support his contention that NBC Sports has “trustworthiness...in the marketplace” that allows it to get away with less certainty.¹⁹

- Dr. Lerner's notion that [[BEGIN CONFIDENTIAL]]

[[END
CONFIDENTIAL]]

Dr. Lerner also fails to grasp that beIN's articulated remedies were sufficient for Comcast from 2012 through 2018.

**I. THE NET BENEFIT TEST IS INAPPLICABLE HERE, AND IT HAS
BEEN MISAPPLIED BY COMCAST IN ANY EVENT**

15. The net benefit test was contemplated by the D.C. Circuit in *Comcast v. FCC*, which arose from Tennis Channel's program-carriage complaint against Comcast. The test is conceptually straightforward: giving a network additional distribution produces additional costs as well as additional benefits for distributors. If the vertically integrated cable operator likely would suffer a net loss to its downstream division by expanding carriage, the operator's refusal to distribute broadly can be justified on efficiency grounds. If the vertically integrated cable

18. Litman Suppl. Decl. ¶20.

19. *Id.*

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operator suffers no net loss to its downstream division (or even benefits) by expanding carriage, however, but nevertheless refuses to give additional distribution, one can infer that said operator is motivated to limit the independent network's distribution by a latent benefit to the operator's upstream content division.²⁰

A. The Net Benefit Test Is Inapposite Here

16. When an independent cable network seeks broader carriage and charges a per-subscriber fee, the cable operator would incur an additional cost, equal to the product of the per-subscriber fee and the incremental number of subscribers. This is not the case here, for a simple reason: Unlike Tennis Channel, beIN [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

17. Because it cannot meet the net benefit test as articulated by the D.C. Circuit in the Tennis Channel matter, Comcast tries to change the test, and instead makes a strawman showing—that *any* carriage of beIN on Comcast's part yields no benefit for Comcast and is essentially an act of philanthropy. Even if such a test were relevant, that showing of the net benefits of *any* carriage suffers from a number of flaws. As a threshold matter, [[BEGIN

20. *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) ("In contrast with the detailed, concrete explanation of Comcast's additional costs under the proposed tier change, Tennis showed no corresponding benefits that would accrue to Comcast by its accepting the change." *Id.* at 986 ("A rather obvious type of proof would have been expert evidence to the effect that X number of subscribers would switch to Comcast if it carried Tennis more broadly, or that Y number would leave Comcast in the absence of broader carriage, or a combination of the two, such that Comcast would recoup the proposed increment in cost. There is no such evidence. (Conceivably Tennis could have shown that the incremental losses from carrying Tennis in a broad tier would be the same as or less than the incremental losses Comcast was incurring from carrying Golf and Versus in such tiers. The parties do not even hint at this possibility, nor analyze its implications.)").

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[[END

CONFIDENTIAL]] was presumably informed by Comcast's duty to its shareholders to pursue profit. The facts show that this duty was fulfilled by the renewal, which served well the interests of Comcast's owners.

18. There is no dispute that Comcast received value from carrying beIN on its Sports and Entertainment Tier and Latino Tier [[BEGIN CONFIDENTIAL]]

21. Mr. Smith, Comcast's Senior VP of Content Acquisition, clarifies that beIN's renewal offer [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

Declaration of Justin Smith ¶10 (February 11, 2019) [hereafter, Smith Declaration]. *See also* Second Complaint, Exhibit 5.

22. [[BEGIN CONFIDENTIAL]]

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[[END

CONFIDENTIAL]]

B. Comcast and Its Experts Fail to Demonstrate a Net Loss to Comcast’s Downstream Division from Broader Carriage

19. Even assuming that the net benefit test is appropriate here, Comcast and its experts have failed to demonstrate a net loss to Comcast’s downstream division from broader carriage as an empirical matter. Dr. Lerner’s implementation of the net benefit test does not actually entail any original, independent economic analysis of his own. Dr. Lerner’s implementation of the test represents a wholesale acceptance of estimates submitted by a Comcast executive (Mr. Brayford) of the extent to which subscribers defected from Comcast as a result of the Challenged Conduct.²³ Mr. Brayford, in turn, relies on an undisclosed analysis by Enterprise Business Intelligence (“EBI”),²⁴ presumably commissioned by Comcast. Dr. Lerner could have performed an independent analysis of customer churn resulting from the Challenged Conduct, as I did in *GSN v. Cablevision*, but he did not. Similarly, Mr. Litman performed no independent analysis—although he opines that Mr. Brayford’s implementation of the net benefit test is “very thorough and reasonable.”²⁵ Mr. Brayford has not provided work papers to support

[[END CONFIDENTIAL]] In any event, the Second Complaint does not allege that Comcast’s rejection of beIN’s offer is a discriminatory act. Instead, it alleges that Comcast’s Counter (and subsequent Removal) are discriminatory.

23. Lerner Suppl. Decl. ¶50.

24. *Id.* ¶¶50-51; Brayford Decl. ¶¶48-51.

25. Litman Suppl. Decl. ¶77.

REDACTED—FOR PUBLIC INSPECTION

his calculations, or those of EBI. Although the details of Comcast’s net benefit test have not been made available to me (or, in my understanding, to anyone outside of Comcast and EBI), certain deficiencies are obvious from the available descriptions.

20. Comcast’s experts ignore predictable downstream losses for Comcast in the net benefit test. Most obviously, Mr. Brayford’s “very thorough”²⁶ analysis fails to tally the losses from cancelled Sports and Entertainment tier and Latino subscriptions. In other words, a dissatisfied beIN (or beINE) loyalist who lost access to beIN (or beINE) might simply engage in “cord shaving” rather than “cord cutting” by cancelling her subscription to the tier on which beIN (or beINE) was previously carried. But Mr. Brayford focuses narrowly on “cord cutting”—despite the fact that his own analysis determined that removing beIN and beINE from those tiers could “reduce the value” of the Sports and Entertainment and Latino tiers, due to the existence of “passionate Comcast customers who *purchase those tiers in order to access beIN programming.*”²⁷ Similarly, Mr. Litman opines that removing beINE from the Sports and Entertainment and Latino tiers would “compromise the revenue it [Comcast] earned from the sale of [Sports and Entertainment or Latino] tiers for which beIN Sports en Español *was a significant draw.*”²⁸

21. Comcast’s experts also ignore network mitigation costs—that is, payments or expenditures of “save desk” and other resources to compensate or appease disgruntled customers for their inability to watch a cancelled network and dissuade them from churning. These are costs

26. *Id.*

27. Brayford Decl. ¶21. (“I further determined that broader distribution of beIN Sports and beINE could reduce the value of the SEP and H tiers, potentially resulting in lost revenue from the relatively small number of passionate Comcast customers who purchase those tiers in order to access beIN programming.”) (emphasis added).

28. Litman Suppl. Decl. ¶50 (emphasis added).

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that Comcast may have incurred to prevent dissatisfied beIN and beINE loyalists from (1) cancelling the Sports and Entertainment or Latino tiers; or (2) cancelling Comcast altogether. Mr. Brayford mentions customer complaint calls in the “low thousands,”²⁹ but he provides no indication as to whether Comcast incentivized any portion of those customers not to leave. In my prior experience implementing the net benefit test, mitigation costs proved to be an economically significant and indeed pivotal factor in the results.

22. Setting aside lost customers on its Sports and Entertainment or Latino tiers, Comcast potentially understates churn from Comcast’s Basic tier attributable to the Removal. According to Mr. Brayford’s description, churn among former beIN viewers was {{BEGIN HCI}}

{{END HCI}} Mr. Brayford fails to {{BEGIN HCI}}

{{END HCI}}

23. Moreover, there is no indication that Mr. Brayford (or EBI) {{BEGIN HCI}}

29. *Id.* ¶48.

30. Brayford Decl. ¶49.

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{{END HCI}} To reiterate, Dr.

Lerner presumably could have opined on such matters, and offered up his own analysis of the EBI data, but he did not.

24. Based on an analysis performed (presumably by EBI at Comcast's behest) in January 2019, Mr. Brayford opines that, "given the similar churn data from both the beIN viewers and the comparison group, the effect on Comcast of no longer carrying beIN had run its course by the end of December [2018]."³² Again, {{BEGIN HCI}}

{{END HCI}} There could be

factors that caused the increased churn to abate, but only temporarily. For example, it could be that Comcast offered mitigation incentives to customers who threatened to cancel in December 2018. It is also unclear whether Mr. Brayford took into account the effect of subscribers that Comcast would have acquired but for the absence of beIN and beINE—or, for that matter, current Comcast subscribers that would have upgraded to the Sports and Entertainment or Latino tiers, but for the absence of beIN and beINE.

25. Comcast may have expected that downstream defections would have been limited due to the likelihood that other distributors would follow suit. Indeed, AT&T—currently the

31. *See, e.g.*, JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 771 (South-Western 2009 4th ed.).

32. Brayford Decl. ¶51.

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largest distributor, vertically integrated since mid-2018—has already done so.³³ When beIN becomes unavailable on competing distributors, this decreases the likelihood that a beIN loyalist will defect from Comcast to another distributor. By this logic, any form of discrimination by Comcast could be beneficial to Comcast, provided that the independent network disappears from a sufficient number of competing distributors as a result of Comcast’s discrimination.

26. Moreover, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] As

explained by Mr. Antonio Briceño, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] that Comcast/NBCU does

not view the broadcast of Lionel Messi and other international soccer celebrities as beneficial to Comcast’s customers or advertisers.

33. Christopher Harris, *beIN SPORTS acquires rights to Copa Libertadores and Copa Sudamericana*, WORLD SOCCER TALK, Jan. 18, 2018, available at <https://worldsoccertalk.com/2019/01/18/bein-sports-acquires-rights-copa-libertadores-copa-sudamericana/> (“DIRECTV used to be the number one provider of soccer programming in the United States until recently, but with DIRECTV deciding not to renew its agreement with beIN SPORTS, the satellite provider has fallen down in the pecking order of must-have providers for soccer fans.”).

34. Briceño Decl. ¶13.

35. Comcast Answer, Response to Numbered Paragraphs ¶4.

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27. A proper analysis of the economic benefits of broader distribution would have to assume, as an initial matter, broader distribution of beIN and then estimate what the churn would be from subsequent discontinuance of beIN when many more Comcast customers have been exposed to its programming. That Comcast purportedly experienced little churn on the basic tier when it removed beIN from the Sports and Entertainment and Latino tiers may not serve as a good predictor of the basic-tier churn Comcast would have experienced had its removed beIN from Comcast's basic tier.

28. Finally, despite Dr. Lerner's claim to a "very thorough" analysis, he does not capture an essential component of Comcast's costs from dropping beIN. Conveniently, he omits studying possible upsides. For example, a "very thorough" analysis would include the lift in viewership to Comcast's affiliated networks attributable to the removal of beIN from its system, as I did for Cablevision's WEtv in the GSN dispute.

C. Comcast's Experts Provide No Evidence That Comcast Consistently Imposes the Same Net Benefit Test on Its Own Affiliated Networks

29. To be economically meaningful, Comcast's implementation of the net benefit test should generate broadly consistent results across Comcast's portfolio of networks, including its affiliated networks. Specifically, application of the test should demonstrate that Comcast consistently retains networks that—according to calculations comparable to Mr. Brayford's here—generate profits for its downstream division, while consistently discarding networks that do not. Yet Comcast's experts fail to provide any evidence to support the dubious proposition that Comcast consistently imposes the same net benefit test on its own affiliated networks that it has applied to beIN here. Comcast provides no evidence that Mr. Brayford's analysis has been applied to any network affiliated with Comcast. It is therefore possible that, as in the case of

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beIN, Comcast's own networks would similarly "fail" the test—that is, the lost margins from departing video subscribers from not carrying NBCSN, Telemundo, Universo (or even for non-soccer sports networks such as The Golf Channel) would be less than the avoided license fees paid to those affiliated networks. If that were the case, and if Comcast applied the test selectively to beIN, then such conduct again would show discrimination on the basis of affiliation.

II. THE RESPONSE OF COMCAST'S DISTRIBUTION RIVALS TO COMCAST DROPPING beIN CANNOT SERVE AS A PROXY FOR THE DECISION-MAKING OF A NON-VERTICALLY INTEGRATED, NON-CONFLICTED DISTRIBUTOR

30. Comcast's economic expert, Dr. Lerner, makes much out of AT&T's decision to drop beIN following Comcast's removal of beIN.³⁶ According to a press release at the time, AT&T/DIRECTV "abruptly cease[d] negotiations" and dropped beIN on August 29, 2018³⁷—28 days *after* Comcast elected to remove beIN on the first of the month.³⁸ Dr. Lerner muses that "the fact that AT&T/DIRECTV dropped the beIN networks at a similar time as Comcast likewise suggests that the beIN networks are of limited value."³⁹ He draws further conclusions from Dish's and Verizon's contemporaneous renewals of beIN at the same tiering levels as previous deals, opining that the companies' "decisions not to expand distribution of the beIN

36. Lerner Suppl. Decl. ¶¶2, 52.

37. *AT&T / DIRECTV Has Dropped beIN SPORTS*, BUSINESSWIRE, Aug. 29, 2018, available at <https://www.businesswire.com/news/home/20180829005806/en/ATT-DIRECTV-Dropped-beIN-SPORTS>.

38. *beIN Sports Removed from Comcast Xfinity Systems*, BUSINESSWIRE, Aug. 2, 2018, available at <https://www.businesswire.com/news/home/20180802005208/en/beIN-Sports-Removed-Comcast-Xfinity-Systems>.

39. Lerner Suppl. Decl. ¶52. Similarly, Mr. Litman claims that "[a]fter Comcast stopped carrying beIN, AT&T had the opportunity to consider a strategy of using carriage of beIN to differentiate its MVPD service from Comcast's, as beIN had suggested. However, AT&T clearly did not see that opportunity as sufficiently attractive under the terms that beIN was proposing." Litman Suppl. Decl. ¶46.

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networks at renewal are additional indicators of the relatively limited appeal and value of their niche programming.”⁴⁰

31. His reasoning about the motivations of rival distributors is flawed for several reasons. AT&T is vertically integrated into national sports programming, having recently acquired Time Warner in mid-2018. In terms of soccer programming, AT&T’s TNT shows UEFA Champions League, UEFA Europa League, and the UEFA Super Cup.⁴¹ AT&T’s TNT and TBS carry professional (NBA) basketball and professional (MLB) baseball games, respectively. Given AT&T’s vertical integration into national sports programming generally and soccer programming in particular, it makes little sense to treat AT&T as a proxy for how a non-vertically integrated distributor would treat beIN.

32. A better proxy for non-discriminatory treatment of beIN is the carriage by “non-conflicted” distributors—that is, distributors that are not vertically integrated into national sports programming. And non-conflicted distributors carry beIN and beINE to more subscribers than does Comcast now and compared with beIN’s penetration under the Comcast Counter. As seen below, before the Comcast Counter, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Had beIN accepted Comcast’s offer, its penetration under the “carry both” standard would have [[BEGIN CONFIDENTIAL]]

40. Lerner Suppl. Decl. ¶53.

41. *Where to find soccer leagues and competitions on US TV and streaming*, WORLD SOCCER TALK, available at <http://worldsoccertalk.com/where-to-find-soccer-on-us-tv-and-streaming/>.

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[[END

CONFIDENTIAL]] After the Removal, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

TABLE 1A: SHARE OF SUBSCRIBERS WITH ACCESS TO BOTH BEIN AND BEINE
[[BEGIN CONFIDENTIAL]]

[[END

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33. Similar results are obtained when one examines carriage of beIN *or* beINE (as opposed to carriage of both). As seen above, before the Comcast Counter, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Had beIN accepted the Comcast's Counter, its penetration under the "carry either network" standard would have [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] After the Removal, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

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TABLE 1B: SHARE OF SUBSCRIBERS WITH ACCESS TO beIN OR beINE
[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

34. With respect to Verizon specifically, beIN had and maintains high penetration among Verizon subscribers, as seen above. Although Dr. Lerner emphasizes that beIN was blacked out for nine days during carriage negotiations with Verizon, he admits that Verizon and beIN reached an agreement that evidently continued to ensure beIN's high level of penetration among Verizon's subscriber base, confirming beIN's value to Verizon.⁴² That Verizon is not vertically integrated yet competes against Comcast in many of the same geographic markets

42. Lerner Suppl. Decl. ¶53. Dr. Lerner notes that Verizon chose "not to expand distribution of the networks at renewal," indicating that the same, high penetration rates were maintained. *Id.* ¶2.

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makes it an important comparable. Similarly, Mr. Litman concedes that Dish agreed to renew its prior agreement, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

Mr. Litman states that beIN was “at best able to hold onto its prior levels of distribution”⁴⁴ with these two large, in-region video rivals to Comcast. But this treatment by non-conflicted rivals is obviously superior to Comcast’s decision to drop beIN entirely. That Dish and Verizon held steady in their carriage of beIN undermines Comcast’s efficiency rationale for discarding beIN and beNE.

35. *Third*, that one large, in-region distributor (AT&T) might mimic the conduct of another large distributor (Comcast) does not demonstrate that Comcast’s conduct is non-discriminatory. When Comcast drops a network from its lineup, it relieves competitive pressure on in-region rival distributors to keep said network in their own lineups—just as one firm’s decision to raise its prices gives its competitors more leeway to do the same. Here, by removing two sports networks from its lineup, Comcast relieved competitive pressure on AT&T to continue offering beIN. As Dr. Lerner emphasizes, “AT&T/ DIRECTV is the nation’s largest MVPD and competes directly with Comcast across its footprint.”⁴⁵ Indeed, I understand from the testimony of Mr. Briceño that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] AT&T

43. Litman Suppl. Decl. ¶18.

44. *Id.* ¶5.

45. Lerner Suppl. Decl. ¶52.

46. Briceño Reply Decl. ¶24

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could have learned of Comcast's Removal from beIN's public letter filed with the FCC on August 1, 2018.⁴⁷ This suggests that AT&T's dropping of beIN was partially precipitated by Comcast's action and cannot be plausibly used to justify it.

III. THE COMCAST EXPERTS' ASSERTION THAT beIN IS NOT SIMILARLY SITUATED TO COMCAST'S NBCSN AND UNIVERSO IS MISGUIDED

36. The Comcast experts claim unconvincingly that beIN and beINE are not similarly situated to NBCSN and Universo. Dr. Lerner argues that beIN's niche focus on soccer makes it not similarly situated for the purposes of a program-carriage dispute.⁴⁸ Similarly, Mr. Litman opines that beIN and beINE are "niche soccer networks."⁴⁹ The Comcast experts' standard is inconsistent with the findings of the ALJ and the Commission in *Tennis Channel v. Comcast*, in which a network that focused exclusively on niche tennis was deemed similarly situated to Comcast's NBC Sports (then called Versus), which carried an array of sports programming (importantly, *not* including tennis).⁵⁰ At the time of Tennis Channel's complaint, Versus exhibited, among other sports programming, cycling (Tour de France), MMA (WEC), lacrosse, soccer, college football, regattas (America's Cup), and Indy Racing.⁵¹ The program carriage provisions, as interpreted by the ALJ and the Commission, were not meant to protect

47. See Letter from Pantelis Michalopoulos, Counsel for beIN Sports, LLC, to Marlene Dortch, Secretary, FCC, MB Docket No. 18-90 (Aug. 1, 2018). The press also reported on Comcast dropping beIN. See, e.g., Jon Lafayette, *beIN Sports Off Comcast in Dispute Over Fees*, BROADCASTING AND CABLE, Aug. 1, 2018, available at <https://www.broadcastingcable.com/news/bein-sports-off-comcast-in-dispute-over-fees>.

48. Lerner Suppl. Decl. ¶15.

49. Litman Suppl. Decl. ¶61 ("My updated analysis continues to demonstrate that the beIN networks are not similarly situated to either NBCSN or Universo. I base this assessment on objective industry data and my experience in the industry. Both beIN networks are niche soccer networks that attract a modest audience and have much more limited distribution among MVPDs and OVDs than NBCSN, a general sports network, and Universo, a Spanish language general entertainment network.").

50. *Tennis Channel, Inc. v. Comcast Cable Communications*, *Memorandum Opinion and Order*, 27 FCC Rcd. 8508, 8511-15 ¶¶ 8-15 (2012) ("*Tennis Channel MO&O*").

51. *Id.*

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independent networks that were *identically* situated from appropriation/discrimination, but instead were meant to protect *similarly* situated networks. If the standard were as exacting as Dr. Lerner and Mr. Litman assume, Comcast effectively would be immunized from the nondiscrimination constraint except in rare cases where it competed with an identical clone to the independent network. In the instant case, Comcast would be immunized from the nondiscrimination regime provided it did not own a soccer-dedicated network—despite the fact that three of its national networks, including Telemundo, provide extensive soccer programming.⁵² The very nature of competition in cable programming compels cable-network entrants to differentiate their products relative to incumbent offerings. Hence, it is not surprising that beIN would be different in certain dimensions from Comcast's networks.

37. The available evidence indicates a significant degree of overlap in viewership between beIN and NBCSN, on the one hand, and beINE and Universo, on the other. Data provided by Nielsen directly measures the degree to which customers who watch beIN (beINE) also watch NBCSN (Universo). As seen below, from 2016 to 2018, [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of customers who viewed beIN also viewed NBCSN within the same year, and [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] of customers who viewed beINE also viewed Universo within the same year.⁵³ If the two pairs of networks are aggregated, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] of customers who viewed beIN or beINE also viewed

52. See Table 4.

53. See Table 2.

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NBCSN or Universo. The Nielsen data therefore show unequivocally that the majority of consumers who watch beIN content also watch NBCSN/Universo content.

TABLE 2: beIN (beINE) VIEWER OVERLAP WITH NBCSN (UNIVERSO)
(2016 – 2018)

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

38. The available evidence also indicates a significant degree of overlap in, and competition for, advertisers between beIN and NBCSN, on the one hand, and beINE and Universo, on the other. Nielsen advertising data show that beIN/NBCSN and beINE/Universo advertised similar products to their audiences. Ranking advertised product categories by ad revenue reveals that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] are also advertised on NBCSN. Similarly, beINE and Universo share [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] advertised by revenue. The data also show that the similar sets of advertisers purchased advertising on the networks at issue: beIN and NBCSN share [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] and beINE and Universo share [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] As seen in Tables 3A and 3B, the networks at issue overlap with respect to

54. Briceño Reply Decl. ¶10.

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advertising product categories.

TABLE 3A: COMMON ADVERTISING PRODUCT CATEGORIES BY NETWORK
BEIN AND NBCSN RANK (TOP 15 BY AD REVENUE)

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

TABLE 3B: COMMON ADVERTISING PRODUCT CATEGORIES BY NETWORK
BEIN AND UNIVERSO RANK (TOP 15 BY AD REVENUE)

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

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39. Dr. Lerner asserts that advertising overlap statistics involving major advertisers are uninformative because these advertisers appear on a wide range of networks.⁵⁵ But this logic cannot be squared with the findings of *Tennis v. Comcast*,⁵⁶ which credited evidence of advertising overlaps as indications of similarly situated networks. Dr. Lerner questions the value of these statistics because the large overlapping advertisers have higher expenditures on other networks. But this is virtually inevitable, given that there are hundreds of additional networks and tens of other sports networks. According to Dr. Lerner, the large number of common advertisers may not be “reliable evidence of competition” because [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] allocated “a material percentage of their ad spend—more than 10 percent” to both the beIN and NBC networks.⁵⁷ Dr. Lerner does not provide a citation to (or basis for) his *ad hoc* ten percent threshold; nor could he, as it lacks any grounding in economics. Given the sheer number of sports-related networks delivering these demographics (see below), it would be surprising to find many advertisers that spend more than ten percent of their budgets on “both the beIN networks and to NBCSN and/or Universo.”⁵⁸

55. Lerner Suppl. Decl. ¶¶38, 40

56. *Tennis Channel MO&O*, 27 FCC Rcd. at 8527 ¶ 54 (“The record further established remarkable overlap in advertisers. As the ALJ noted, in 2010 [REDACTED] of Golf Channel’s revenue and [REDACTED] of Versus’s revenue from each of their 30 largest non-endemic advertisers came from either recent advertisers on Tennis Channel or from companies that Tennis Channel was soliciting to advertise. Of Tennis Channel’s 30 largest non-endemic advertisers in 2010, [REDACTED] advertised on Golf Channel and [REDACTED] advertised on Versus.”) (citations omitted).

57. Lerner Suppl. Decl. ¶41.

58. *Id.*

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40. The significant advertising overlap among the networks at issue is the likely consequence of the fact that their viewers share similar demographics.⁵⁹ beIN and NBCSN are primarily watched by [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

beINE and Universo share [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] In any event, many overlapping advertisers provide products or services in markets that the NBC and beIN networks are especially suitable platforms for reaching. For example, Boost Mobile advertised on beINE and Universo, suggesting that both platforms deliver a coveted demographic for a prepaid wireless services provider.⁶²

41. As Mr. Litman acknowledges, high-profile, “marquee” sporting events disproportionately drive viewership and advertising, particularly among sports networks such as NBCSN and beIN.⁶³ Mr. Litman further explains that “[t]he primary value MVPDs see in sports

59. Dr. Lerner highlights certain demographic differences to suggest the networks at issue are not similarly situated. But it is obvious that, among any two networks, there will always be differences along at least some dimensions of at least some demographics. Dr. Lerner seems to suggest that a difference on a single dimension would suffice to prove that two networks are not similarly situated. Again, this is inconsistent with the Commission’s decision in *Tennis Channel v. Comcast*.

60. Briceño Reply Decl. ¶12; *see also* beIN Comcast Competition Profile, attached as Exhibit 7.

61. Briceño Reply Decl. ¶13.

62. *Id.* ¶11.

63. Litman Decl. ¶16 (“Because a television network has 168 hours per week to program, inevitably much of the programming even on the top sports networks like ESPN is filler – replays, highlight shows, sports talk and the like. The primary value MVPDs see in sports networks is their highest profile or “marquee” programming – that is

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networks is their highest profile or ‘marquee’ programming,” while much of the remaining content is “filler.”⁶⁴ In other words, a sports network’s most economically significant content makes up a disproportionately small fraction of the total content in minutes that it broadcast, yet does most of the heavy lifting in terms of viewership and advertising. Perhaps the most obvious example from another sport is the Super Bowl, which lasts all of four hours but accounts for over 17 percent of the network’s advertising revenues for the quarter.⁶⁵ All of the networks at issue rely on marquee events to drive their viewership and attract advertisement.⁶⁶

42. The shared element that completes the proof of similarly situated status is soccer programming. NBCSN, beIN/beINE, Universo, and Telemundo significantly own and compete directly for soccer programming. The rights to the EPL, La Liga, and Ligue 1 are clearly valuable from the perspective of both beIN and NBCSN: This is why NBC spent \$1 billion to acquire the telecast rights to the English Premier League (EPL) in the United States,⁶⁷ and why La Liga earns nearly \$2.7 billion a season on telecast rights from beIN and other networks broadcasting its games globally.⁶⁸ It is also why Telemundo spent an undisclosed sum to obtain

programming that they promote in their subscriber acquisition campaigns, and that their local ad sales operations highlight to potential advertisers.”).

64. *Id.*

65. NBC Universal’s broadcast segment earned \$2,365 million in advertising revenues in Q1 2018. Comcast Apr 25, 2018 10-Q, available at <https://www.cmcsa.com/static-files/9ed49aef-e952-4c8c-bcf8-3ffae5ff4ebf>. Industry experts estimate the 2018 Super Bowl generated NBC \$419 million in advertisement revenue, \$500 million including the pre- and post-game coverage (equal to $\$419 / \$2,365 = 0.177\%$, or $\$500 / \$2,365 = 0.211\%$). Jon Lafayette, *Super Bowl Generated \$414M in Ad Revenue*, BROADCASTING AND CABLE, Feb. 5, 2018, available at <https://www.broadcastingcable.com/news/super-bowl-generated-414m-ad-revenue-171555>.

66. See Table 4, *infra*.

67. Richard Sandomir, *NBC Retains Rights to Premier League in Six-Year Deal*, NEW YORK TIMES, Aug. 10, 2015, available at <https://www.nytimes.com/2015/08/11/sports/soccer/nbc-retains-rights-to-premier-league-in-six-year-deal.html>.

68. Tales Azzoni, *La Liga expects to earn more from new TV rights*, USA TODAY (November 14, 2017), available at <https://www.usatoday.com/story/sports/soccer/2017/11/14/la-liga-expects-to-earn-more-from-new-tv-rights/107685418/>.

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the Spanish-language rights to the 2019 Copa America to be held in Brazil, and it spent \$600 million to outbid rival Univision for the rights to 2018 and 2022 World Cups.⁶⁹ La Liga (Spain), Ligue 1 (France), and the English Premier League (United Kingdom) are all part of the “Big Five” European soccer leagues, along with Bundesliga (Germany) and Serie A (Italy).⁷⁰ These leagues regularly compete against each other, with the best teams from each domestic league competing annually in the UEFA Champions League.⁷¹

43. In addition to televising marquee soccer events of similar quality, beIN and Comcast’s subsidiaries (NBCSN, Universo, and Telemundo) broadcast some of the *same* soccer events. In the United States, the 2018 CONCACAF World Cup Qualifiers were televised by beIN in English and by Telemundo and Universo in Spanish.⁷² Telemundo held rights to the Spanish-language broadcast of the 2018 Copa Libertadores, and beIN has since obtained both the

69. James Wagner, *Telemundo Has a Big Goal: Win the World Cup*, The New York Times (June 23, 2018), available at <https://www.nytimes.com/2018/06/23/sports/world-cup/telemundo-fox.html>.

70. Arjun Panchadar, *Soccer-Big five European leagues enjoy record revenues – Deloitte*, Reuters (June 7, 2018), available at <https://www.reuters.com/article/soccer-england-deloitte/soccer-big-five-european-leagues-enjoy-record-revenues-deloitte-idUSL5N1T82X4>. See also “Revenue of the biggest (Big Five*) European soccer leagues from 1996/97 to 2018/19,” Statista, available at <https://www.statista.com/statistics/261218/big-five-european-soccer-leagues-revenue/>. The English Premier League leads these leagues in revenue generation (€5.7 billion), followed by Germany’s Bundesliga (€3.7 billion), Spain’s La Liga (€3.5 billion), Italy’s Serie A (€2.3 billion) and France’s Ligue 1 (€1.9 billion).

71. Kirsten Schlewitz, *Beginner’s guide to the UEFA Champions League*, SBNation (September 11, 2014), available at <https://www.sbnation.com/soccer/2014/9/11/6135491/uefa-champions-league-guide>. In the final for the 2017/2018 season, Real Madrid (of La Liga) defeated Liverpool (of the English Premier League) for their third consecutive win of tournament. See Daniel Taylor, *Real Madrid win Champions League as brilliant Bale sinks Liverpool*, The Guardian (May 26, 2018), available at <https://www.theguardian.com/football/live/2018/may/26/real-madrid-v-liverpool-champions-league-final-2018-live>.

72. Jacobson Adam, *beIN Sports ‘Enhances’ Its Content Strategy*, Multichannel News (June 1, 2016), available at <https://www.multichannel.com/news/bein-sports-enhances-its-content-strategy-405296>. *Telemundo & Universo to Air Exclusive Coverage of CONCACAF Qualifiers for 2018 FIFA World Cup*, Broadway World (August 31, 2017), available at <https://www.broadwayworld.com/bwwtv/article/Telemundo-Universo-to-Air-Exclusive-Coverage-of-CONCACAF-Qualifiers-for-2018-FIFA-World-Cup-20170831>.

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Spanish- and English-language rights for this tournament from 2019 to 2022.⁷³ Table 4 below shows the U.S. broadcast rights to marquee soccer matches held by beIN and Comcast’s affiliates.

TABLE 4: CURRENT TELEVISION BROADCAST RIGHTS OF MARQUEE SOCCER

beIN	Comcast (NBCSN, Universo, Telemundo)
La Liga	English Premier League (NBCSN)
Ligue 1	FIFA World Cup (NBCSN)
CONCACAF: World Cup Qualifiers (English) (before 2019)	CONCACAF: World Cup Qualifiers (Spanish, Telemundo)
Copa Libertadores (2019+)	Copa América (2019, Spanish, Telemundo/Universo)
Copa Sudamericana (2019+)	Copa Libertadores (Spanish, Final Match, 2018, Telemundo)
Recopa Sudamericana	Women’s World Cup (Spanish, Telemundo/Universo)
Copa Del Rey	
El Clásico	
Coupe de France	
Coupe de la Ligue	
French Super Cup	
Turkish Süper Lig	
African Cup of Nations	
Toulon Tournament	

Sources: Briceño Reply Decl. ¶9.

44. The Comcast experts emphasize unadjusted, national-level Nielsen ratings as evidence that the networks at issue are not similarly situated.⁷⁴ But these data do not control for the total number of households that can receive a given channel. As a consequence, beIN’s national-level ratings are endogenous to Comcast’s decision not to distribute beIN more broadly—and ultimately to drop it—and also to other distributors’ response to Comcast’s challenged conduct. Similarly, the national-level ratings of Comcast’s affiliated networks are

73. Ceysun Dixon, *Copa Libertadores final to air on Telemundo in the US*, SPORTSPRO MEDIA, Dec. 6, 2018, available at <http://www.sportspromedia.com/news/copa-libertadores-final-telemundo-tv-rights>, *beIN SPORTS Wins Exclusive Broadcast Rights to Copa Libertadores, Copa Sudamericana and Recopa Sudamericana*, ASSOCIATED PRESS, Jan. 18, 2019, available at <https://www.apnews.com/7f640715d0c341e4a5bb412c96607fdb>.

74. Lerner Suppl. Decl. ¶27.

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endogenous to Comcast's favorable treatment of them: Clearly, NBCSN and Universo have a greater opportunity for viewership given their broader carriage by Comcast. Economists also recognize that networks owned by a cable operator are carried more broadly by other vertically integrated cable operators, potentially owing to implicit coordination via reciprocal carriage agreements.⁷⁵ Nielsen publishes coverage-area data, which measure viewership after controlling for distribution. [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Dr. Lerner asserts that coverage-rating comparisons are inappropriate because sports tier viewers are predisposed to viewing sports, and that broader distribution of beIN and beINE could dilute these statistics.⁷⁷ This strawman argument misses the point, which is that the ratings data unadjusted for distribution say little about whether the networks at issue are similarly situated given the incumbency advantage of cable-affiliated networks. It also ignores the fatal endogeneity flaw of the analysis—that the conduct led to decreased distribution.

45. Although Dr. Lerner disavows the importance of the number of soccer events in the top 50 telecasts when it comes to Universo (17 of 50), he embraces its meaning when applied

75. Jun-Seok Kang, Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study, TPRC Research Conference on Communication, Information, and Internet Policy, Washington, D.C., Sept. 23-25, 2005 *available at* <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.155.2053&rep=rep1&type=pdf>.

76. beIN Reply to Comcast Answer ¶ 64, MB Docket No. 18-90 (June 4, 2018).

77. Lerner Suppl. Decl. ¶28.

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to NBCSN.⁷⁸ The simple fact is that both networks rely to a significant extent on soccer programming, but even if they did not, they could still be similarly situated under the FCC's/ALJ's precedent in *Tennis Channel*. By Dr. Lerner's own estimates, weighted by viewership, soccer makes up [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Under Dr.

Lerner's proposed standard, the share of soccer programming apparently would have to converge for the two networks to be similarly situated. Under this "identically situated" standard, Versus and Tennis Channel could not have been found to be similarly situated, as Versus's share of tennis programming was zero percent.

46. Dr. Lerner displays data indicating that audience overlap with beIN is greater for other networks than for Universo, and for [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] other than for NBCSN.⁸⁰ These statistics are hardly indicative of a lack of similarity, given all of the possible network pairings that could have been performed. To the contrary, the data that Dr. Lerner displays actually provide evidence that beIN's audience has similar preferences to those of Comcast's networks, which implies that the networks are similar situated: Even according to Dr. Lerner, [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] That these statistics also imply other networks are likely similarly situated to

78. *Id.* ¶21.

79. *Id.* ¶19. And weighting by viewership might understate those networks' dependence on soccer. For example, an advertising-weighted scheme or one that focused exclusively on the more valuable prime-time window, might show even higher shares. But the issue is not whether soccer looms large on these networks. Instead, the issue is whether these networks compete for the same type of viewers and advertisers as other networks in the sports genre.

80. Lerner Suppl. Decl. ¶¶30-31; Tables 1-2.

81. *Id.*

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beIN and beINE does not prove that the networks at issue are not similarly situated; these are not mutually exclusive possibilities.

47. Dr. Lerner also asserts that the networks at issue are not similarly situated because
[[BEGIN CONFIDENTIAL]]

[[END
CONFIDENTIAL]]

The statistics are uninformative, in light of the NBC networks' broader distribution: Most NBCSN and Universo viewers do not receive Comcast's Sports and Entertainment and Latino tiers, and thus cannot view beIN, beINE, or any other content on these tiers.

48. Finally, Dr. Lerner proposes a statistical test that purports to show a lack of substitution in advertising expenditures across the networks at issue.⁸³ Specifically, Dr. Lerner calculates the correlation between "the change in advertising spend on the beIN networks to the change in advertising spend on NBCSN and Universo."⁸⁴ Dr. Lerner's analysis holds nothing constant and thus does not support his conclusion. For example, Dr. Lerner fails to control for changes in pricing. The standard economic definition of substitution is based on the change in demand for good *A* in response to change in the price of good *B*, holding the price of *A* constant (or by measuring the price of *B* relative to *A*). Accordingly, Dr. Lerner's correlation analysis says little if anything about the cross-price elasticity of demand for the networks at issue. Just as important, in trying to prove that advertisers do not move business between beIN's and NBC's networks, Dr. Lerner produces a chart that undermines his thesis: It shows [[BEGIN

82. *Id.* ¶32.

83. *Id.* ¶43.

84. *Id.*

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[[END

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**IV. AS A RESULT OF COMCAST’S REMOVAL, BEIN’S ABILITY TO COMPETE FAIRLY WAS
UNREASONABLY RESTRAINED**

49. Comcast’s discriminatory offer was a go-out-of-business invitation that beIN could not afford to accept, leading to discontinuation of beIN carriage by Comcast.⁸⁶ Given the most-favored-nation clauses in beIN’s agreements with other distributors, beIN’s penetration likely would have decreased across the board, causing affiliate and advertising revenue to plummet. Accordingly, Comcast’s discriminatory conduct likely has materially harmed beIN and impaired its ability to compete effectively. At a minimum, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Moreover, beIN’s loss of Comcast subscribers renders the network less attractive to advertisers. Since the Removal, beIN has [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] Comcast’s Removal also placed beIN in an inferior negotiating position, which was exploited by at least one distributor.⁸⁹ beIN lost carriage on AT&T, and failed to secure broader carriage on Verizon and Dish. [[BEGIN CONFIDENTIAL]]

85. *Id.* Figure 4 (top-left quadrant).

86. Second Complaint ¶4.

87. *Id.* ¶4.

88. *Id.* ¶126. *See also* Briceño Decl. ¶54.

89. Briceño Reply Decl. ¶25.

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[[END CONFIDENTIAL]]

50. That beIN remains available to Comcast's customers with a broadband connection through Internet-based platforms such as SlingTV does not compensate for this impairment. Comcast's experts do not mention that the viewing of content on SlingTV counts against Comcast data caps and hence is a substantially inferior alternative from the customer's vantage. Nor do Comcast's experts discuss the subscribers who have an interest both in beIN and in other networks available on Comcast's Sports and Entertainment or Latino packages but not on the Sling package; for them, continuing to watch beIN while keeping their Sports and Entertainment (or Latino) package would require an incremental expenditure of \$10 a month. With no budget constraints, Comcast subscribers who live in Verizon's footprint could also subscribe to Verizon FIOS to watch beIN, but Comcast's experts do not invoke this even more costly alternative. (It bears noting that satellite television was available when Congress wrote the discrimination protections, which implies that the mere presence of a distribution alternative does not obviate the nondiscrimination obligations under the Cable Act.) In sum, Internet-based alternatives for accessing beIN are likely cost-prohibitive for many subscribers, and excusing discriminatory conduct based on these options would thwart the intent of the Cable Act.

51. Finally, Mr. Litman claims falsely that growth in beIN subs outside of Comcast (Comcast being the "foreclosed" segment) proves that beIN was not unreasonably restrained (or

90. *Id.* ¶27 (the diminution of distribution on Comcast makes it difficult or impossible for beIN to attain the 40 million mark that is considered an important milestone in the industry).

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impaired in its ability to compete) by the conduct.⁹¹ This claim is uneconomic and confuses the counterfactual. The relevant question is what beIN's growth outside the foreclosed segment *would have been absent the challenged conduct*. Even if the conduct had no effect on beIN's growth in the non-foreclosed segment, that beIN is growing there actually suggests that other distributors highly value beIN's programming, thereby undermining Comcast's efficiency defense. In any event, Comcast's footprint in the national market for MVPD video distribution is sufficiently large (almost one quarter of all MVPD video subscribers)⁹² that it alone can deny beIN of critical economies of scale; one may not be able to see this kind of impairment via short-term subscriber trends.

V. COMCAST'S ECONOMIC EXPERTS PROVIDE NO CREDIBLE ECONOMIC FOUNDATION FOR PURPORTED "UNCERTAINTY" AS A JUSTIFICATION FOR THE CONDUCT AT ISSUE

52. Comcast's experts offer several justifications for why beIN's proposal did not provide sufficient certainty against the loss of programming.⁹³ None is convincing. Even a premium incumbent sports network such as ESPN cannot guarantee the exact composition of its programming one day beyond the expiration of any of any particular contracts; at that point, the underlying rights could be bid away by any number of network rivals or even non-network rivals such as Facebook or Amazon.⁹⁴ The same dynamic is even more applicable to a relatively

91. Litman Suppl. Decl. ¶7 ("Comcast's behavior towards beIN has not unreasonably restrained its ability to compete in the content marketplace. Other MVPDs continue to carry beIN's networks, and beIN itself states in the Complaint that its networks are growing.").

92. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighteenth Report*, 32 FCC Rcd 568, 596 ¶ 68, Table III.A.5 (2017) (showing Comcast subscribers of 22.347 million and MVPD total subscribers of 99.407 million or 22.5 percent).

93. Lerner Suppl. Decl. ¶2 (bemoaning too much "uncertainty" in beIN's programming); Litman Suppl. Decl. ¶11.

94. In August 2018, Facebook signed an exclusive deal to show every La Liga game, for the next three seasons, to viewers in India, Afghanistan, Bangladesh, Bhutan, Nepal, The Maldives, Sri Lanka and Pakistan. See, e.g., Dave Lee, *Another Big Sports Deal for Amazon*, BBC NEWS, Aug. 14, 2018. The social network already shows Major

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(compared to ESPN) nascent sports network such as beIN. Indeed, it appears that Comcast's experts are exploiting beIN's relatively nascent nature as a pretext to not carry beIN.⁹⁵ Penalizing a network for its novelty would have unfortunate policy implications, particularly when it comes to encouraging the formation of new cable networks and edge innovation generally.

A. Uncertainty Over Sports Rights Is Inherent in Sports Programming

53. The obvious contractual remedy for uncertainty over sports programming is not a discriminatory refusal to deal or discriminatory tiering. [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] Standard economic principles explain that firms use contracts to efficiently manage and reduce uncertainty.⁹⁶ It makes little sense for Comcast to cite uncertainty over an inherently uncertain enterprise as an *ex ante* basis for dropping beIN in a discriminatory way, especially given Comcast's vertical integration into competing national sports programming and the Cable Act's nondiscrimination protections.

League Baseball to U.S. audiences at a reported cost of \$1 million per game. The National Football League renewed the 2017 deal with Amazon to bring 11 "Thursday Night Football" matches to Amazon's Prime. *Id.*

95. Litman Suppl. Decl. ¶18 ("beIN has only been in the market for six years—a fraction of the tenure of leading sports programmers like ESPN, Fox, or Turner.").

96. *See, e.g.,* OLIVER E. WILLIAMSON, O. E. THE ECONOMIC INSTITUTIONS OF CAPITALISM (Free Press 1985) (explaining how business transactions are structured in challenging decision environments, including uncertainty).

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54. Dr. Lerner claims that beIN's offer lacked certainty, in part because [[BEGIN CONFIDENTIAL]]

[[END

CONFIDENTIAL]] Dr. Lerner implies that other sports networks are immune to this uncertainty. If the comparables he has in mind are sports networks such as MASN (jointly owned by the Orioles and the Nationals) or MLB Network (two-thirds owned by MLB), which own the underlying telecast rights of their marquee programming, then his comparison would be inapt. Sports networks that do not own the underlying telecast rights, including beIN, the Golf Channel, and ESPN, are always susceptible to losing some telecast rights when those contracts with the ultimate rightsholders expire. The sports examples he mentions in a footnote⁹⁸—NBCSN's commitments to showcase NHL, NASCAR, EPL, and the Olympics—are also susceptible to a loss in telecast rights, as these rights are sporadically put up for bid by the underlying rightsholder. It is not clear what Dr. Lerner means when he claims the "duration of these rights" is "widely known."⁹⁹ But it does not mean that NBCSN can offer guarantees of this content beyond the years covered in NBCSN's current contracts with those rightsholders.

97. Lerner Suppl. Decl. ¶9 ("[C]onsistent with the Commission's conclusion, the fact that the 'like for like' provision [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] did not sufficiently lessen the uncertainty regarding the programming that beIN would provide. Clearly, beIN could still replace Italian Serie A and French Ligue 1 games with [[BEGIN CONFIDENTIAL]]

CONFIDENTIAL]].").

98. *Id.* ¶9 n.18.

99. *Id.*

[[END

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55. Dr. Lerner's notion that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

56. In a similar vein, Mr. Litman argues that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] As

discussed above, the nature of a sports network is inherently uncertain; this is not a discrete variable that somehow turns on and off at some desired level of programming. So long as the telecast rights cover a finite set of years, there will be uncertainty. Moreover, Comcast's Sports and Entertainment tier is not a highly penetrated package, which makes the statement irrelevant. And the fact that both Verizon and Dish kept beIN after beIN lost Serie A programming reveals that the value of the remaining programming to those distributors exceeded beIN's license

100. *Id.* ¶12.

101. Litman Suppl. Decl. ¶21 (emphasis added).

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fees.¹⁰² Mr. Litman makes much of beIN's lack of agreement with National Cable Television Cooperative,¹⁰³ but the rural nature of those distributors¹⁰⁴ suggest that their (non-Latino and older) audiences might not enjoy live soccer programming as much as urban audiences of the nation's largest distributors.

B. The Like-For-Like Provision

57. Dr. Lerner argues that “in my extensive experience,” beIN's like-for-like provision is “not standard or common.”¹⁰⁵ It is not clear what, if any, experience Dr. Lerner possesses in sports-programming contract design.¹⁰⁶ Dr. Lerner also states his experience entails reviewing “hundreds of sports programming agreements.”¹⁰⁷ He fails to explain how uncertainty over sports programming rights was dealt with in these other matters, particularly for a nascent sports network that did not own the underlying television rights such as beIN. Dr. Lerner will not say how uncommon the like-for-like provision was in his sample, or what he has seen in the alternative, or explain his measure of standard or common. What if like-for-like appears in (say) one quarter of the contracts he reviewed? That would make it economically significant but not standard. Also, why are the contracts reviewed by Dr. Lerner in any way representative of the relevant population of sports contracts? Of course, the NFL Network will deliver NFL games, as

102. ESPN outbid beIN for Serie A in early August 2018. *See* John Ourand, *Serie A, FA Cup deals show ESPN still a big believer in power of soccer*, Sports Business Journal (August 13, 2018), available at <https://www.sportsbusinessdaily.com/Journal/Issues/2018/08/13/Media/Sports-Media.aspx>

103. Litman Suppl. Decl. ¶18.

104. NCTC, About Us, available at <https://nctc.com/nctc-story/> (“For 67 years and counting, NCTC has been serving your community with the best technology in rural America, and today NCTC has some of the most advanced technology in the world!”).

105. Lerner Suppl. Decl. ¶ 7. Similarly, Mr. Litman states that current matter is “quite different” from his experience with other programmers. Litman Suppl. Decl. ¶4. But if he has in mind vertically integrated programmers such as NFL or MASN who own the underlying rights, then this is an apples-to-oranges comparison.

106. Dr. Lerner has not testified in any program carriage dispute to my knowledge.

107. Lerner Suppl. Decl. ¶5.

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the network owns the underlying rights (vertically integration upstream). But will non-vertically integrated Tennis Channel deliver the same tennis tournaments every year with certainty? Will the non-vertically integrated Golf Network deliver the same golf tournaments with certainty? Will NBCSN deliver the same ECL soccer matches with certainty? Economic experts take sampling seriously, and there is no way to judge the reliability of Lerner's sample, which is most likely unrepresentative and potentially litigation-inspired.

58. Dr. Lerner makes much of [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] Dr. Lerner conveniently ignores these possibilities. [[BEGIN CONFIDENTIAL]]

108. *Id.* ¶6.

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[[END CONFIDENTIAL]]

59. Mr. Litman argues that the “like-for-like” provision signals beIN’s “concerns” about its programming.¹¹⁰ To the contrary, the provision most likely reflects the inherent uncertainty in securing long-lived sports rights, which generally change hands throughout the industry. ESPN acquired the rights to air “Monday Night Football” from previous owner ABC in 2006 (both networks are owned by the Walt Disney Corporation).¹¹¹ In that same year, NBC acquired the right for “Sunday Night Football,” previously held by rival ESPN.¹¹² In 2002, NBC lost the rights to televise the National Basketball Association (to ESPN),¹¹³ and the rights to televise National Hockey League have been owned by CBS, NBC, USA Network, ESPN, SportsChannel America, ABC, and Fox throughout the league’s history.¹¹⁴

60. “Like-for-like” provisions reflect the reality that sports television broadcast rights are uncertain and, to a reasonable degree, substitutable. Fox Network famously outbid CBS for

109. See Reply Declaration of Roy Meyeringh (May 6, 2019) ¶5, attached as Exhibit 3 to beIN’s Reply.

110. Litman Suppl. Decl. ¶14.

111. *Monday Night Football coming to ESPN*, ESPN, Apr. 19, 2005, available at <http://www.espn.com/nfl/news/story?id=2040130>.

112. *NFL Returns to NBC*, GE, Press Release, Apr. 20, 2005, available at https://web.archive.org/web/20050421050824/http://ge.com/stories/en/20346.html?category=Product_Home.

113. Richard Sandomir, *Basketball; NBC Will Live Without N.B.A. and Without Losses From It*, NEW YORK TIMES, Jan. 9, 2002, available at <https://www.nytimes.com/2002/01/09/sports/basketball-nbc-will-live-without-nba-and-without-losses-from-it.html>.

114. Alexandra Gharghoury and Danielle Ohl, *National Hockey League Media Coverage: A history of Passion and Struggles*, Shirley Povich Center for Sports Journalism (accessed February 2019), available at <http://povichcenter.org/HockeyProject/NHLHistory.html>.

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the rights to the NFC games of the National Football League in 1993.¹¹⁵ Scrambling to replace this gap in programming, CBS immediately attempted to execute a “like-for-like” replacement strategy by acquiring rights to televise the AFC games of the NFL. Although CBS was unsuccessful that year (NBC, the current owner, had secured a backroom deal after news of the Fox usurpation), CBS managed to acquire the rights to air the AFC games of the NFL in 1998, outbidding NBC by a half billion dollars.¹¹⁶ The president of CBS sports later claimed that “[CBS] lost affiliates, ratings, the male audience and a lot of sports sponsorships. But when CBS got the NFL back, everything picked up again.”¹¹⁷ That CBS held the AFC league instead of the NFC league did not seem to bother its executives or advertisers.

C. beIN Has Provided Other Significant Assurances in the Event of a Loss in Marquee Programming

61. Dr. Lerner has not characterized [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

115. Joe Reedy, *How Fox’s 25 seasons of covering the NFL changed the game*, AP NEWS, Dec. 27, 2018, available at <https://apnews.com/9816ca0d0b3546ac92353c655d40cab8>. See also Bryan Curtis, *The Great NFL Heist: How Fox Paid for and Changed Football Forever*, THE RINGER, Dec. 13, 2018, available at <https://www.theringer.com/nfl/2018/12/13/18137938/nfl-fox-deal-rupert-murdoch-1993-john-madden-terry-bradshaw-howie-long-jimmy-johnson-cbs-nbc>

116. Joe Reedy, *How Fox’s 25 seasons of covering the NFL changed the game*, AP NEWS, Dec. 27, 2018.

117. *Id.*

118. Lerner Suppl. Decl. ¶13.

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62. Similarly, Mr. Litman reveals his unfamiliarity with [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] In offering acceptable alternatives to beIN's proposal, he claims that uncertainty over sports programming could have been alleviated with a right to terminate "if a performance threshold was not met."¹¹⁹ But beIN [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

Like Dr. Lerner, Mr. Litman fails to understand that beIN is not the underlying rights holder, and thus cannot guarantee carriage of certain soccer rights in perpetuity. As explained below, nor can (and nor do) the NBC networks.

63. Mr. Litman claims that {{BEGIN HCI}}

{{END HCI}}

64. With respect to [[BEGIN CONFIDENTIAL]]

119. Litman Suppl. Decl. ¶12.

120. *Id.* ¶20.

121. Lerner Suppl. Decl. ¶14.

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[[END CONFIDENTIAL]] It bears noting that programming changes continuously for a general entertainment network such as TNT or USA, which suggests this problem is not specific to sports networks or beIN in particular. [[BEGIN CONFIDENTIAL]]

[[END
CONFIDENTIAL]]

65. Most important, Comcast effectively admits that its NBC Sports and Universo affiliates offer no more certainty to distributors than beIN has provided Comcast. As Mr. Litman puts it now, Comcast merely {{BEGIN HCI}}

{{END HCI}} are less than what beIN has offered Comcast: {{BEGIN HCI}}

{{END HCI}} Indeed, with

122. Litman Suppl. Decl. ¶ 20.

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regard to the La Liga rights specifically, Comcast's argument that [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

66. I understand that Comcast withheld this information in its response to beIN's first complaint. In my opinion, this deprived the Media Bureau of an economically significant fact because the Bureau's dismissal was based precisely on this ground—lack of sufficient certainty about beIN's content rights.

D. Other Allegedly Nonstandard Provisions of the Contract

67. Mr. Litman suggests that beIN's proposed [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

68. Mr. Litman also objects to beIN's providing games to Verizon Wireless, a non-wireline distributor, at potentially lower rates. But such an offer should not threaten or diminish

123. Complaint ¶ 7.

124. *Id.* ¶ 11.

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the value of Comcast's wireline video-service offering.¹²⁵ Few customers, if any, would cancel Comcast's Sport and Entertainment tier, let alone cancel Comcast altogether, to watch live soccer programming on a tiny mobile screen. It is one thing to watch a cat video on a mobile device; it is quite another to watch a three-hour sports matchup where the players are unrecognizable dots on the mobile screen. And as policy matter, it is anticompetitive for Comcast to seek to thwart the advent of rival distribution technologies, even when they are inferior substitutes to wireline distribution of sports programming. At most, Comcast may insist that it gets equal terms as those extended to wireline cable—although even some economists point out how most-favored nation's (MFN) clauses demanded by incumbents impair competition and entrench powerful interests.¹²⁶ The Commission should not condone Comcast's effort to extend its MFN to upstart video distributors.

CONCLUSIONS

69. For the foregoing reasons, I conclude (1) Comcast and its economic experts have misapplied the net benefit test; (2) The response of Comcast's distribution rivals to the Removal cannot serve as a reasonable proxy for the decision-making of a non-vertically integrated, non-conflicted distributor; (3) beIN and beINE are similarly situated to NBCSN and Universo, and Comcast's assertions to the contrary are not compelling; (4) As a result of Comcast dropping beIN, beIN was likely materially impaired in its ability to compete for viewers and advertisers;

125. Verizon withdrew its mobile video service offering, go90, in June 2018. *See, e.g.,* Romain Dillet, *Verizon is shutting down go90*, TECHCRUNCH, June 29, 2018, available at <https://techcrunch.com/2018/06/29/verizon-is-shutting-down-go90/>,

126. *See, e.g.,* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE LAW JOURNAL 1742-2203 (2018) (explaining why MFNs employed by online platforms can harm competition by keeping prices high and discouraging the entry of new platform rivals, through both exclusionary and collusive mechanisms).

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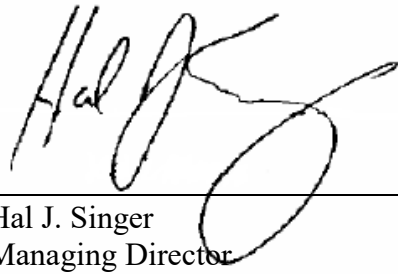
and (5) Comcast's experts provide no credible economic foundation for purported "uncertainty" in beIN's future programming as a justification for the conduct at issue. Although many of the elements of a discrimination complaint cannot be fully informed without access to Comcast's internal documents, based on my review of publicly available data and my experience in prior program-carriage litigation, it appears that beIN has a significant chance of prevailing at the merits.

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* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on May 6, 2019

A handwritten signature in black ink, appearing to read "Hal J. Singer", is written over a horizontal line.

Hal J. Singer
Managing Director
Econ One Research, Inc.

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APPENDIX A



Curriculum Vitae of Hal J. Singer

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Education

Ph.D., The John Hopkins University, 1999; M.A. 1996, Economics

B.S., Tulane University, *magna cum laude*, 1994, Economics. Dean's Honor Scholar (full academic scholarship). Senior Scholar Prize in Economics.

Current Position

ECON ONE RESEARCH, Washington, D.C.: Managing Director 2018-Present.

GEORGETOWN UNIVERSITY, MCDONOUGH SCHOOL OF BUSINESS,
Washington, D.C.: Adjunct Professor 2010, 2014, 2016, 2018,
2019.

GEORGE WASHINGTON UNIVERSITY, SCHOOL OF PUBLIC POLICY,
GEORGE WASHINGTON INSTITUTE FOR PUBLIC POLICY,
Washington, D.C.: Senior Fellow 2016-present.

Employment History

ECONOMISTS INCORPORATED, Washington, D.C.: Principal 2014-2018.

NAVIGANT ECONOMICS, Washington, D.C.: Managing Director,
2010-2013.

EMPIRIS, L.L.C., Washington, D.C.: Managing Partner and
President, 2008-2010.

CRITERION ECONOMICS, L.L.C., Washington, D.C.: President,
2004-2008. Senior Vice President, 1999-2004.

LECG, INC., Washington, D.C.: Senior Economist, 1998-1999.

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U.S. SECURITIES AND EXCHANGE COMMISSION, OFFICE OF ECONOMIC ANALYSIS, Washington, D.C.: Staff Economist, 1997-1998.

THE JOHNS HOPKINS UNIVERSITY, ECONOMICS DEPARTMENT, Baltimore: Teaching Assistant, 1996-1998.

Honors

Honoree, Outstanding Antitrust Litigation Achievement in Economics, American Antitrust Institute, *In re Lidoderm Antitrust Litigation*, Oct. 9, 2018.

Finalist, Outstanding Antitrust Litigation Achievement in Economics, American Antitrust Institute, *Tennis Channel v. Comcast*, Dec. 4, 2013.

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American Bar Association Section of Antitrust Law

Reviewer

Journal of Risk and Insurance

Journal of Competition Law and Economics

Journal of Risk Management and Insurance Review

Journal of Regulatory Economics

Managerial and Decision Economics

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Telecommunications Policy

REDACTED—FOR PUBLIC INSPECTION

EXHIBIT 6

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	File No. CSR-8972-P
)	
v.)	
)	
COMCAST CABLE COMMUNICATIONS,)	
LLC,)	
And)	
COMCAST CORPORATION,)	
Defendants.)	
)	
)	
TO: Chief, Media Bureau)	

DECLARATION OF STEVEN SKLAR

REDACTED—FOR PUBLIC INSPECTION

I, Steven Sklar, being over 18 years of age, swear and affirm as follows:

1. I have significant experience in the program carriage marketplace, where multichannel video programming distributors (“MVPDs”) negotiate with video programmers for carriage of their content. I currently serve as Managing Member of S Squared Advisory, LLC, where I provide consulting and advisory services to media and telecommunications companies on, among things, content distribution and licensing. From 2005 until 2018, I worked at CenturyLink, most recently as Vice President, Video and Content Strategy. In this capacity, I negotiated programming rights agreements involving more than 100 networks and subscription video-on-demand services, and oversaw the development of CenturyLink’s video products, including Prism TV and CenturyLink Stream. I have also worked for programmers such as STARZ Entertainment and HBO in connection with their dealings with MVPDs, including Comcast. I have thus been afforded intimate views on the industry from both sides of the negotiating table. This has equipped me well to compare the motivations and actions of such a distributor with those of a distributor who has its own programming interests.

2. beIN has requested that I compare the assurances and representations beIN provided in its offers to Comcast about the programming it would provide to the programming assurances and representations that NBC Sports provides in its agreements with distributors, and evaluate whether beIN provided more certainty than NBC Sports does. beIN also requested that I evaluate whether Comcast’s withholding of NBC Sports’ programming assurance practices in its answer to beIN’s initial program carriage complaint deprived the Media Bureau of a decisionally significant fact.

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3. In my opinion, Comcast effectively admits that its NBC Sports and Universo affiliates offer no more, and in fact less, certainty to distributors than beIN has provided Comcast. It is my understanding that, in its offers to Comcast, beIN made the following assurances: [[BEGIN CONFIDENTIAL]]

¹ Complaint ¶¶ 48, 50.

² Reply Declaration of Roy Meyeringh ¶ 6, attached as Exhibit 3.

³ Complaint ¶¶ 48, 61.

⁴ *Id.*

⁵ *Id.* ¶ 48.

⁶ *Id.* ¶ 50.

[[END CONFIDENTIAL]]

4. Comcast, on the other hand, according to its expert, Mr. Peter Litman, {{BEGIN HCB}}

⁷ *Id.* ¶ 52.

⁸ *Id.*

⁹ *Id.*

¹⁰ Supplemental Declaration of Peter Litman ¶ 20, attached as Exhibit 4 to Comcast’s Answer (“Litman Suppl. Decl.”).

¹¹ *Id.*

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¹² Complaint ¶ 7.

{{END HCI}}

9. Mr. Litman's implication that NBC Sports's trustworthiness in the marketplace allows it to get away with such lesser assurances is wrong. In my opinion, NBCUniversal's market power as a broadcast conglomerate is what enables it to get away with lesser assurances. NBCUniversal has must-have programming, such as its NBC network, the Olympics (which NBC offers over multiple NBC network properties), and the USA network. For other MVPDs, even large ones, to obtain access to this programming, they must acquiesce to carrying the rest of NBC's programming. This is a widespread phenomenon in the programming market, where just a handful of the largest programmers, including NBC, are able to force MVPDs to accept as many as 65 channels to acquire distribution rights to just a few must-have channels or programs. It is by wielding this power that NBC has achieved broad distribution not only for NBC Sports and Universo but also for such undeniably specialty content as the SyFy channel.

10. Mr. Litman fails to provide examples to support his claim that NBC Sports has a "better reputation for its programming, production, and promotion expertise" than beIN.¹³ beIN holds the rights to the top European soccer league, La Liga, as well as the popular French Ligue 1. beIN has [[BEGIN CONFIDENTIAL]]

¹³ Litman Suppl. Decl. ¶ 19.

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[[END CONFIDENTIAL]] Further, beIN, like NBC Sports, has powerful economic incentive to secure advertising revenues. Mr. Litman does not support his contention that beIN is much more reliant on affiliate revenue than NBC Sports, nor why such reliance affects beIN's trustworthiness.¹⁵

11. Mr. Litman's focus on beIN's "business relationships with other distributors [being] far from complete and concrete" relies on circular reasoning. As explained by Mr. Antonio Briceño, [[BEGIN CONFIDENTIAL]]

[[END
CONFIDENTIAL]]

Mr. Litman's focus on the shuttering of beIN's sister network, Al Jazeera America, meanwhile, ignores that NBC Sports' sister networks Chiller, Esquire Network, and Cloo have also been shut down.¹⁷

12. Additionally, I understand that Comcast withheld information on NBC Sports' programming assurance practice in its response to beIN's first complaint. In my opinion, this

¹⁴ Complaint ¶ 52.

¹⁵ Litman Suppl. Decl. ¶ 19.

¹⁶ Reply Declaration of Antonio Briceño ¶ 24, attached as Exhibit 1.

¹⁷ See Cynthia Littleton, *NBCUniversal Cable to Shutter Chiller Channel*, Variety (Nov. 16, 2017), <https://variety.com/2017/tv/news/nbcuniversal-shutter-chiller-cable-channel-1202616649/>.

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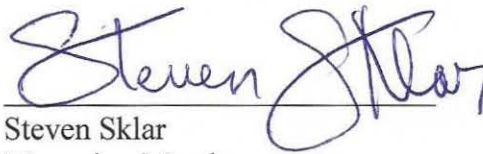
deprived the Media Bureau of a decisionally significant fact because the Bureau's dismissal was based precisely on this ground—lack of sufficient certainty about beIN's content rights.

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* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on May 6, 2019

A handwritten signature in blue ink, appearing to read "Steven Sklar", written over a horizontal line.

Steven Sklar
Managing Member
S Squared Advisory, LLC

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EXHIBIT 7

REDACTED—FOR PUBLIC INSPECTION

REDACTED IN ITS ENTIRETY

REDACTED—FOR PUBLIC INSPECTION

EXHIBIT 8

REDACTED—FOR PUBLIC INSPECTION

REDACTED IN ITS ENTIRETY

REDACTED—FOR PUBLIC INSPECTION

EXHIBIT 9

REDACTED—FOR PUBLIC INSPECTION

REDACTED IN ITS ENTIRETY